February 2017 MPT File: In re Ace Chemical

Montagne & Parks LLC
Attorneys at Law
760 Main Street, Suite 100
Essex, Franklin 33702

MEMORANDUM

To: Examinee
From: Lauren Scott, Managing Partner
Date: February 21, 2017
Re: Ace Chemical: potential conflicts of interest

Our law firm has been approached by Ace Chemical Inc., which wants to sue Roadsprinters Inc. for breach of a shipping contract. Ace claims that Roadsprinters failed to timely deliver Ace's goods to a customer. It is likely that Ace has a good case—the contract has a "time is of the essence" clause and delivery of the goods was significantly delayed. The work on this case would be done here at our Franklin office; I would be the lead attorney, and our partner Samuel Dawes would be the lead litigator. The law firm of Adams Bailey serves as Roadsprinters' outside counsel.

As you know, our firm has 400 lawyers in 14 different offices. Recently, we've become aware of certain circumstances that might affect our ability to represent Ace: 1) our office in the state of Columbia represents the Columbia Chamber of Commerce, and Jim Pickens, the president of Roadsprinters, was at one time chair of the Chamber's board; 2) Samuel Dawes once represented Roadsprinters in a trademark registration; and 3) our office in the state of Olympia has interviewed and would like to hire Ashley Kaplan, an attorney who currently works in Adams Bailey's Franklin office.

We will not undertake this representation if barred by the Franklin Rules of Professional Conduct, but we would very much like to take on this client in this matter if it is ethically permissible. We know that Roadsprinters will not waive any conflicts of interest.

Please prepare a memorandum to me analyzing whether any potential conflicts of interest are raised by these three circumstances. If you determine that one or more conflicts of interest exist, for each conflict you should identify the action we need to take to comply with the Rules. Do not draft a separate statement of facts, but be sure to integrate the relevant facts into your analysis. Note that Franklin's Rules of Professional Conduct are identical to the ABA's Model Rules of Professional Conduct and that Franklin Ethics Opinions are persuasive but not binding authority before courts.

Montagne & Parks LLC

MEMORANDUM TO FILE

From: Lauren Scott, Managing Partner
Date: February 17, 2017
Re: Ace Chemical: potential conflicts of interest

Montagne & Parks, through its Franklin office, would like to represent Ace Chemical Inc. in its suit against Roadsprinters Inc. Ace alleges that Roadsprinters breached its contract with Ace when Roadsprinters failed to deliver goods to Ace's customer on time. Roadsprinters is represented by the law firm of Adams Bailey.

Potential conflict: Columbia Chamber of Commerce

Through our office in the state of Columbia, our firm represents the Columbia Chamber of Commerce (Chamber); we have represented the Chamber for the last 10 years. (The Chamber is a membership organization of local businesses that promotes the general interest of the business community.) In the course of our representation of the Chamber, we have lobbied before the Columbia legislature for tax reform. For purposes of this lobbying effort, we received no confidential business information from Chamber members.

In our communications with Chamber members, we clarified that we represented the Chamber, and not the members, in lobbying, and that the content of our communications with members was not confidential. The Chamber and its members acknowledged in writing that our representation was limited to lobbying for the Chamber itself. While we received confidential information from the Chamber about legislative strategies and tactics related solely to tax issues, we received no confidential information from or about any of the Chamber's members.

Roadsprinters has been a member of the Chamber since the Chamber's inception 15 years ago. Jim Pickens has been the president of Roadsprinters for the last 20 years and was chair of the board of the Chamber in one of the years of our representation; however, throughout the lobbying effort, the firm worked primarily with the Chamber's executive director and not with the officers of the board.

Potential conflict: Samuel Dawes

Samuel Dawes, a partner in this firm, has successfully represented Ace against other adversaries in several other matters, and Ace wants him to handle this litigation.

Seven years ago, while he was in solo private practice, Mr. Dawes represented Roadsprinters in an uncontested trademark registration. Mr. Dawes has been interviewed consistent with Franklin Rule of Professional Conduct 1.6(b)(7). We have concluded that no information that he learned, or could have learned, could possibly be relevant to the litigation against Roadsprinters. Mr. Dawes reports that he has not had any contact with Mr. Pickens, the president of Roadsprinters, for the last five years.

Potential conflict: Ashley Kaplan

Our Olympia office has informed us that it recently interviewed Ashley Kaplan for a position as a senior associate in that office. The Olympia office was very impressed with Ms. Kaplan and wants to make her an offer—the office badly needs someone with her expertise. Ms. Kaplan currently works for the Franklin office of Adams Bailey. Ms. Kaplan has provided a list of the clients for which she has done work at Adams Bailey, and Roadsprinters is on that list.

FRANKLIN DAILY NEWS
Spotlight on a "Rising Star" in the Community

ESSEX—(December 20, 2010) As part of our series profiling rising stars in our business community, the *Franklin Daily News* this month shines a spotlight on young attorney Samuel Dawes.

Mr. Dawes is a graduate of the University of Franklin (B.A. in English and J.D.) and is currently in solo private practice in Essex, Franklin. He specializes in litigation and intellectual property work. Although he might one day want to work at a big firm, Mr. Dawes currently enjoys both the flexibility and the challenge of working alone. Mr. Dawes has been in solo practice for about five years, and he says he truly loves the independence and the opportunity to form close and lasting relationships. When asked for a specific example, Mr. Dawes mentioned his relationship with Jim Pickens, the president of his client Roadsprinters Inc. He stated that "Mr. Pickens taught me so much. He was so generous with his time and advice. It is people like him who make me love my job."

According to Mr. Pickens, he came to Mr. Dawes for help in registering a trademark for "Roadsprinters" and saw real promise in the young lawyer. "Sam is a great guy and a great lawyer," he said. "Although it was not at all necessary for the work on the trademark registration, I told him how to develop client relationships and I introduced him to community business leaders. I knew he was someone who was going places—and I wanted to help him get there."

According to other lawyers with whom we spoke, Mr. Dawes is a rising star in the legal profession. He combines a strong intellect, a curious mind, and a desire to help others. He listens to his clients and truly seeks to help them. We expect great things of Mr. Dawes.

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Excerpts from the Franklin Rules of Professional Conduct

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

> . . .
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> . . .
>
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

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Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rule 1.6 . . . that is material to the matter; unless the former client gives informed consent, confirmed in writing.

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Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

Franklin Ethics Opinion 2015-212

Ten lawyers are forming a new law firm in the state of Franklin. Each of the lawyers has, until recently, been a partner at a major law firm. All of them were at different firms, and many of those firms had several offices. In establishing the new firm, the lawyers want to properly assess potential conflicts of interest and thus determine their obligations regarding clients of their former firms. Specifically, they ask the following three questions:

1) Under Rule 1.9(a) of the Franklin Rules of Professional Conduct, how does a lawyer determine whether a matter is "substantially related" to another matter?
2) How do the Rules of Professional Conduct deal with lawyers who move from one firm to another firm?
3) How do the Rules of Professional Conduct treat a law firm with offices in multiple states?

Question One. Under Rule 1.9(a) of the Franklin Rules of Professional Conduct, how does a lawyer determine whether a matter is "substantially related" to another matter?

A lawyer has always been prohibited from using confidential information that he or she has obtained from a client against that client. But because this prohibition has not seemed enough by itself to make clients feel secure about reposing confidences in lawyers, the Rules have added a further prohibition: a lawyer may not represent an adversary of his or her former client if the subject matter of the two representations is "substantially related." A substantial relationship exists when the lawyer *could* have obtained confidential information in the first representation that would be relevant in the second representation. It is immaterial whether the lawyer actually obtained such information and used it against the former client, or whether—if the lawyer is a firm rather than an individual practitioner—different people in the firm handled the two matters and scrupulously avoided discussing them. The reason that the disqualification occurs regardless of whether the lawyer actually obtained confidential information is practical: conducting a detailed factual inquiry into whether confidences had actually been revealed would likely compromise the confidences themselves.

In addition, the "substantial relationship" test is in keeping with the profession's aspiration to avoid the appearance of impropriety. For a law firm to represent one client today, and the client's adversary tomorrow in a closely related matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the lay public—or for that matter the bench and bar. Clients will not share confidences with lawyers whom they distrust and will not trust firms that switch sides.

Question Two. How do the Rules of Professional Conduct deal with lawyers who move from one firm to another firm?

Rule 1.9 itself removes some of the harshness of the "substantial relationship" test when a lawyer moves from one firm to another. "A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rule 1.6 . . . that is material to the matter." Thus the new firm may represent a client with materially adverse interests to the client of the moving lawyer's old firm so long as the lawyer did not *actually* acquire confidential information. Even if the lawyer acquired confidential information, Rule 1.10 allows the law firm to continue representation of the client so long as the moving lawyer is screened from all contact with the matter. In order to properly screen, the lawyer must be denied access to all digital and physical files relating to the client and/or the matter. All digital files must be password protected and the screened lawyer must not have the password. All physical files must be under lock and the screened lawyer must not have the key. In addition, all lawyers in the firm must be admonished that they cannot speak with or communicate in any way with the screened lawyer about the matter. Finally the lawyer cannot receive any compensation resulting from representation in the matter from which she or he is being screened. Screening must take place as soon as possible, but in no case may it occur after the screened lawyer has had any contact with information about the matter from which he or she is being screened.

In addition, Rule 1.10 requires that the law firm promptly give written notice to any affected former client in order to enable the former client to ascertain compliance with the provisions of the Rule. This notice shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

Question Three. How do the Rules of Professional Conduct treat a law firm with offices in multiple states?

A confidence is defined by Rule 1.6 as "information relating to the representation." This is intended to be applied broadly. It includes anything that the lawyer learns that has any bearing on the matter in which the lawyer is representing the client. Even information that is publicly available is confidential if it meets the definition in Rule 1.6. The Franklin Rules of Professional Conduct presume that confidences are shared by members of a law firm. This is why Rule 1.10 presumptively imputes a conflict of one member of a firm to the entire firm. Especially in these days of telecommuting, electronic files, and multi-state transactions, the imputation of Rule 1.10 applies to all members of the law firm, regardless of the office in which they work. Thus the conflict of one member of the firm is imputed to the entire firm—every office of that firm, regardless of the number of offices the firm maintains.

Hooper Manufacturing, Inc. v. Carlisle Flooring, Inc.
Franklin Supreme Court (2002)

In this action, Carlisle Flooring, Inc., has filed a complaint alleging that Hooper Manufacturing, Inc., has interfered with Carlisle's ability to contract with other manufacturers that produce the wax necessary for the creation of Carlisle's hardwood floors. Carlisle has a contract with Hooper, and for the last 10 years, Carlisle has bought all of its wax from Hooper. In its complaint, Carlisle alleges that Hooper has recently raised its prices for wax to the point that Carlisle can no longer produce hardwoods at a competitive price. In addition, Carlisle alleges that it sought out other wax producers but was told by each of them that Hooper would not allow them to sell to Carlisle.

The case is in the early stages of discovery, and Carlisle has filed a motion to disqualify Hooper's counsel, the venerable law firm of Klein and Wallace (K&W). The trial court denied the motion to disqualify, and Carlisle filed an interlocutory appeal to the Franklin Court of Appeal. The Court of Appeal reversed the trial court, and Hooper appeals.

According to affidavits filed by Carlisle, attorneys from K&W work as lobbyists for the professional trade association to which Carlisle belongs. Hooper counters that the lobbying organization is distinct from its members. Thus, according to Hooper, K&W should not be disqualified as its counsel.

Lobbying is an activity in which attorneys often engage. For purposes of determining whether a lawyer previously represented or is currently representing a client, we will take for granted that lobbying constitutes representation by an attorney. The harder question here is whether K&W's representation of the trade association is tantamount to representation of a member of that trade association.

The first issue we must address is what law to apply to this case. Both parties have cited the Franklin Rules of Professional Conduct. We acknowledge that the Rules of Professional Conduct are only intended to govern the regulation of lawyers. They are thus not binding on courts when faced with questions other than attorney discipline. Nonetheless, it would be foolish for courts to ignore those Rules when they are applicable to a lawyer's conduct. In the absence of any overriding policy considerations, courts in this state will be guided by the Rules of Professional Conduct, in addition to any other applicable law, in determining motions for disqualification based on conflicts of interest.

Since this case involves a concurrent conflict of interest, we look to Rule 1.7 of the Franklin Rules of Professional Conduct.

K&W is representing Hooper in direct opposition to Carlisle. The question thus posed is whether the representation of the trade association to which Carlisle belongs is equivalent to the representation of Carlisle itself.

In making this determination, the Court must be guided by the facts of the particular situation. The critical question one must ask is whether the trade association member provided confidential information to the lawyer that was necessary for the lawyer's representation of the trade association. If the answer is "yes," then the representation of the trade association is equivalent to representation of the member. However, even if the answer to that question is "no," the representation might still be deemed equivalent if the lawyer advised the member of the trade association that any and all information provided to the lawyer would be treated as confidential.

Confidential information is any information related to the representation of the client and learned during the course of the representation. Franklin Rule of Professional Conduct 1.6. The definition is very broad and includes all information, even publicly available information, that the lawyer discovers or gleans while representing the client. The information must, however, be related to the representation. A client cannot protect extraneous information simply by telling his or her lawyer. A client may have many conversations with the lawyer about any number of matters which have no relevance to the representation for which the lawyer was retained. These conversations cannot later be used by the client to prevent the lawyer from representing a party who is adverse to the client.

In this case, Carlisle, as a member of the trade association, provided only publicly available information to K&W lawyers for their work of lobbying on behalf of the trade association. While information related to the representation is normally treated as confidential if it meets the other requirements of Rule 1.6, we hold that a member's provision of publicly available information to counsel for the trade association does not, in and of itself, disqualify counsel for the trade association from representing a client who is adverse to the member.

We must then ask whether the lawyers for the trade association (here K&W) advised the member (here Carlisle) that information provided to the lawyers for the trade association would be treated as confidential. Affidavits submitted by attorneys from K&W state that they informed the members of the trade association, including Carlisle, that the information provided to K&W and in support of the representation of the trade association would not be kept confidential.

Based on the fact that Carlisle provided only publicly available information to K&W in its representation of the trade association and that K&W told Carlisle that any information provided to K&W would not be kept confidential, we hold that representation of the trade association is not equivalent to representation of Carlisle. Thus, K&W's representation of Hooper is not directly adverse to a former client (i.e., the trade association).

But our analysis does not end there. Under Rule 1.7(a)(2), we must next ask whether representation of both Hooper and the trade association will materially limit the firm's ability to represent either client.

The critical factual inquiry is whether an employee of Carlisle had an important position in the trade association and, in that position, worked closely with the lawyers for the trade association. The affidavits filed by Carlisle state that Carlisle's chief executive officer, Nina Carlisle, serves as one of three members of the trade association's legislative and policy committee. In this capacity, Nina Carlisle works closely with K&W attorneys, developing legislative strategy and directing K&W lawyers on legislative tactics. The affidavit notes that Nina Carlisle meets with these attorneys in person and communicates with them via email every day during the legislative session, and an average of every two weeks during the rest of the year.

Under Rule 1.7(a)(2), this contact between K&W attorneys and Carlisle's chief executive officer materially limits K&W's ability to represent both Hooper and the trade association. The language of Rule 1.7(a)(2) refers to the "personal interest of the lawyer." This standard requires us to focus on the nature and extent of the relationship between the attorneys and Carlisle's representatives. The closer and more frequent the contact and the more active the role of the member representative in directing the lawyer, the greater the risk that the lawyer's ability to engage in concurrent representation is "materially limited." In this case, Carlisle's CEO plays an active role in directing K&W's attorneys and has frequent contact with them. This creates a substantial risk that the K&W attorneys' personal interests would materially limit the concurrent representation.

Carlisle's motion to disqualify Hooper's counsel should have been granted. The order of the Court of Appeal is AFFIRMED and the matter remanded to the trial court.

February 2017 MPT Point Sheet: In re Ace Chemical

This February 2017 MPT Point Sheet was provided to bar examiners to assist in grading the examination. It addresses the factual and legal points encompassed within the MPT. While it is illustrative of the discussions that might have appeared in excellent responses constructed by examinees, it is more detailed than examinee responses were expected to be.

In re Ace Chemical

DRAFTERS' POINT SHEET

In this performance test, examinees work for Montagne & Parks (the Firm), a law firm which has been asked to represent Ace Chemical Inc. in a lawsuit against Roadsprinters Inc. In that lawsuit, Ace will be claiming that Roadsprinters failed to deliver goods to Ace's customer in a timely manner. The issues in the problem do not relate to that lawsuit; rather, they relate to three potential conflicts of interest: 1) the Firm's Columbia office represents the Columbia Chamber of Commerce (Chamber), and Jim Pickens, the president of Roadsprinters, was once the chair of the board of the Columbia Chamber of Commerce; 2) Samuel Dawes, who would be the litigation partner in charge of the Ace litigation, once represented Roadsprinters in a trademark registration; and 3) the Firm's Olympia office has interviewed and would like to hire attorney Ashley Kaplan, who is currently employed by the Franklin office of Adams Bailey, the firm representing Roadsprinters.

The managing partner has asked the examinee to draft a memo analyzing the three potential conflicts of interest. The analysis should include the relevant law, determining in each circumstance whether a conflict of interest exists and, if so, how the Firm should handle the conflict. While the Firm will decline the case if necessary, the partner would very much like the Firm to be able to engage in the representation. The memo should therefore include any possible action that the firm could take to ameliorate the conflict.

The File contains 1) the instructional memorandum; 2) a file memorandum from Lauren Scott, the managing partner; and 3) an article from the *Franklin Daily News* spotlighting Samuel Dawes. The Library contains 1) excerpts from the Franklin Rules of Professional Conduct, specifically Rules 1.6, 1.7, 1.9, and 1.10; 2) Franklin Ethics Opinion 2015-212; and 3) the case of *Hooper Manufacturing v. Carlisle Flooring*. The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

Examinees must, first, master the facts as revealed by the memo from Lauren Scott and the newspaper article; second, master the relevant law, including the Franklin Rules of Professional Conduct; and third, apply that law to the facts so as to determine whether a conflict of interest exists. If the examinee determines that a conflict exists, in each instance the analysis should include a discussion of whether the conflict disqualifies the Firm from representing Ace or whether steps can be taken that will allow the Firm to take the case.

1) <u>The Firm's concurrent representation of the Chamber of Commerce</u>: The question is whether the Firm's ongoing representation of the Chamber, of which Jim Pickens once served as board chair, is a conflict of interest that would disqualify the Firm from representing Ace Chemical in its suit against Roadsprinters.

2) Samuel Dawes's prior representation of Roadsprinters in a trademark registration: Mr. Dawes is a partner at the Firm and will be the chief litigator on behalf of Ace in the litigation. Seven years ago, when he was in solo private practice, he represented Roadsprinters in a trademark registration. The question is whether Mr. Dawes's prior representation of Roadsprinters is a conflict of interest that would disqualify the Firm from representing Ace Chemical in its suit against Roadsprinters.

3) The hiring of Ashley Kaplan, a current attorney at Adams Bailey: The Olympia office of the Firm has interviewed and wants to hire Ashley Kaplan. She is currently employed as an attorney at the Franklin office of Adams Bailey, the firm which will presumably be representing Roadsprinters in the litigation.

II. DISCUSSION

A. Facts

Although examinees are instructed not to restate the facts, they must be mastered properly and incorporated into the legal analysis.

Montagne & Parks (the Firm) is a law firm with 400 lawyers in 14 different offices. Lawyers in the Franklin office of the Firm would like to represent Ace Chemical in its suit against Roadsprinters. Ace alleges that Roadsprinters breached its contract with Ace when Roadsprinters failed to deliver goods to Ace's customer on time. Samuel Dawes would be the lead litigator in the case. Roadsprinters is represented by the law firm of Adams Bailey.

Potential conflict: Chamber of Commerce

The Firm's Columbia office currently represents (and has represented for the last 10 years) the Columbia Chamber of Commerce. The Chamber is a membership organization of local businesses that promotes the general interest of the business community. The Firm's representation of the Chamber principally consists of lobbying before the Columbia legislature for tax reform. For purposes of this lobbying effort, the Firm received no confidential business information from Chamber members.

In its communications with Chamber members, the Firm has always made clear that it represents the Chamber, and not its members, in lobbying, and that the content of the Firm's communications with members is not confidential. While the Firm received confidential information from the Chamber about legislative strategies and tactics related solely to tax issues, it received no confidential information from or about any of the members of the Chamber.

Roadsprinters Inc. has been a member of the Chamber since the Chamber's inception 15 years ago. Jim Pickens has been the president of Roadsprinters for the last 20 years and was chair of the board of the Chamber during one of the years of the Firm's representation. Throughout its lobbying effort on behalf of the Chamber, the Firm worked primarily with the Chamber's executive director and not with the officers of the board.

Potential conflict: Samuel Dawes

Samuel Dawes, a member of the Firm, would serve as trial counsel for Ace Chemical in this matter. Seven years ago, while he was in solo private practice, Mr. Dawes represented Roadsprinters in a trademark registration. Mr. Dawes has been extensively interviewed by members of the Firm who have concluded that no information that Mr. Dawes learned, or could have learned, during the trademark registration could possibly be relevant to this litigation. There is a seven-year-old article from the *Franklin Daily News* spotlighting Mr. Dawes. In that article Mr. Pickens, president of Roadsprinters, is quoted as saying: "[Samuel Dawes] is a great guy and a great lawyer. Although it was not at all necessary for the work on the trademark registration, I told him how to develop client relationships and I introduced him to community business leaders. I knew he was someone who was going places—and I wanted to help him get there." Mr. Dawes reports that he has not had any contact with Mr. Pickens for the last five years.

Potential conflict: Ashley Kaplan

The Firm's Olympia office recently interviewed Ashley Kaplan for a position as a senior associate in that office. The Olympia office was very impressed with Ms. Kaplan and wants to make her an offer—the office badly needs someone with her expertise. Ms. Kaplan currently works for the Franklin office of Adams Bailey. Ms. Kaplan has provided a list of the clients for which she has done work at Adams Bailey, and Roadsprinters Inc. appears on that list.

B. Analysis

The analysis of this problem should be consistent with the Franklin Rules of Professional Conduct, which are identical to the ABA Model Rules.

1. Concurrent Representation of Trade Association

The concurrent representation of the trade association and Ace Chemical should be analyzed under Rule 1.7 of the Franklin Rules of Professional Conduct. Rule 1.7 prohibits an attorney from representing a client when "the representation of [that] client will be directly adverse to another client; or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

The examinee should determine whether it matters that the potentially conflicting interests are represented by different offices of the Firm. To answer this question, the examinee should refer to Ethics Opinion 2015-212, which states that, regardless of the number of attorneys and/or offices, a law firm is one unified whole for purposes of imputation of conflicts of interest. Thus, it does not matter that the Columbia office represents the Chamber while the Franklin office represents Ace Chemical. If there is a conflict, it is imputed to the entire firm. While the Firm's representation of the Chamber is limited to lobbying, the *Hooper Manufacturing* court determined that lobbying is a form of legal representation.

The representation would only be "directly adverse" to another client if representation of the Chamber, of which Roadsprinters is a member (and Jim Pickens was once the board chair), is equivalent to the direct representation of Roadsprinters itself. According to the *Hooper Manufacturing* case, there is a multi-factor test for determining the answer to this question: First, did the Chamber member provide confidential information about the member's business to the lawyer that was necessary for the lawyer's representation of the trade association? And, even if not, did the lawyer tell the member that the information would be kept confidential? If the member did provide confidential information, or if the attorney told the member that information would be kept confidential, then the representation of the trade association is equivalent to the representation of the member.

Neither Roadsprinters nor Pickens provided confidential information about Roadsprinters' business to the Firm. In addition, the Firm was careful to tell all the Chamber members that any information they provided to the Firm was not confidential and that the Firm was representing the Chamber, not its members. Thus the representation of the Chamber is not equivalent to the representation of Roadsprinters, and, consequently, the Firm's representation of Ace would not be "directly adverse" to that of a current client.

Even if the representation is not directly adverse, Rule 1.7 requires that the analysis go further to determine whether there is a significant risk that the lawyer's representation of a client will "materially limit[]" his or her representation of another client. To this end, again according to *Hooper Manufacturing*, one must determine whether an employee of the member was in a powerful position in the trade association and directed the work of the attorney for the trade association. The closer the relationship between the member and the law firm, the more likely it is that the representation of the trade association—in this case the Chamber—would materially limit the lawyer's ability to represent an opponent of the member. Although Pickens served as chair of the board of the Chamber, he had limited contact with the Firm during that period. The work of the Firm was directed by the executive director of the Chamber, rather than by board members. Thus, it is unlikely that the Firm would be materially limited by any loyalty to Pickens or to Roadsprinters.

The Firm's representation of the Chamber does not pose a conflict of interest to its representation of Ace Chemical in its suit against Roadsprinters.

2. Dawes's Prior Representation of Roadsprinters

First the examinee must determine whether a conflict of interest of Mr. Dawes would be imputed to the Firm. Rule 1.10 provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9." Thus a conflict of Mr. Dawes would be imputed to the Firm.

The examinee must then determine if a conflict exists. The resolution of this issue is governed by Rule 1.9, which analyzes duties of loyalty to former clients. Rule 1.9(a) states: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." The interests of the two clients are materially adverse—the current client, Ace, would be in direct opposition to the former client, Roadsprinters. Thus the question to be determined is whether the current representation is "substantially related" to the trademark registration Mr. Dawes pursued on behalf of Roadsprinters. According to Ethics Opinion 2015-212, a substantial relationship exists when the lawyer *could* have obtained confidential information during the first representation that would be relevant to the subsequent representation. It is immaterial whether the lawyer actually obtained such information or whether the lawyer actually uses it against the former client.

In this case, the matters are not substantially related—the information needed to pursue the trademark registration is not at all relevant to this representation. Mr. Dawes has been fully vetted, and the partners are convinced that nothing he learned or could have learned in the trademark registration would be of any benefit in the current litigation. However, we know from the newspaper article that Mr. Pickens did voluntarily share additional business information with Mr. Dawes, even though that information was unrelated to the trademark registration. Mr. Pickens provided Mr. Dawes with introductions to community leaders and told him how to develop clients. Is this additional business information protected by Rule 1.6, and, if so, does it make the representations substantially related? Even though Rule 1.6 is very broad, this information is not confidential. As stated in *Hooper Manufacturing*, Rule 1.6 only protects information "related" to the representation. Information voluntarily told to a lawyer that is not for the purpose of obtaining legal advice is not "related" to the representation.

Mr. Dawes's prior representation of Roadsprinters does not create a conflict of interest to the Firm's representation of Ace Chemical in its suit against Roadsprinters.

3. Hiring of Ashley Kaplan

Ms. Kaplan currently works for Adams Bailey (Roadsprinters' counsel) and has interviewed for a position with the Firm's Olympia office. In her disclosure to the Firm, she has indicated that, while at Adams Bailey, she has done work for Roadsprinters.

She would be working in the Olympia office, while the Ace litigation will be handled by the Franklin office. The examinee must determine whether, if Ms. Kaplan were to move to the Firm, her conflict of interest would be imputed to other offices of the Firm. To answer this question, the examinee should refer to Ethics Opinion 2015-212, which states that, regardless of the number of attorneys and/or offices, a law firm is one unified whole for purposes of imputation of conflicts of interest. Thus, it does not matter that Ms. Kaplan may be working in a different office than the one representing Ace; if there is a conflict of interest, it is imputed to the entire firm.

The potential conflict of interest should be analyzed under Rule 1.9(b) of the Franklin Rules of Professional Conduct, which states: "A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rule 1.6."

The interests of the two clients are materially adverse—the Firm's client, Ace, is going to sue the client of Ms. Kaplan's current employer. If Ms. Kaplan is going to come to the Firm, the Firm must determine whether the matters are "substantially related." According to Ethics Opinion 2015-212, a substantial relationship exists when the lawyer *could* have obtained confidential information during the first representation that would be relevant to the subsequent representation.

Rule 1.9(b), related to the work of a former firm, employs a more limited restriction than the "substantial relationship" test used in Rule 1.9(a) for the work by a lawyer for that lawyer's own former client. In order for a conflict to exist under Rule 1.9(b), the lawyer must actually have learned confidential information from the client. We don't know if Ms. Kaplan has actually done so. Rule 1.6 is exceedingly broad and protects all information relating to the representation. Rule 1.6(b)(7) allows lawyers to reveal confidential information to determine conflicts, but only if it does not violate privilege or otherwise compromise the attorney-client relationship. It is very likely that Ms. Kaplan has learned information related to the representation. Moreover, a careful lawyer (which we assume the Firm to be) would not want to violate Rule 1.6 by asking too many questions of Ms. Kaplan about Roadsprinters. The Firm would be cautious to assume that a conflict exists and determine what to do.

Examinees could also reasonably analyze Ms. Kaplan's potential conflict under Rule 1.9(a). Ms. Kaplan identified Roadsprinters as one of the clients for which she had done work while at the Adams Bailey law firm, and so it could be determined that she "formerly represented" Roadsprinters, and her situation falls under Rule 1.9(a). But those examinees must still go on to discuss the application of Rule 1.10 screening procedures that would allow the Firm to take on Ace as a client.

Assuming that Ms. Kaplan comes to work at the Firm and that she has learned information protected by Rule 1.6, the Rules permit her to be screened from the matter. According to Ethics Opinion 2015-212, screening mechanisms must include, at a minimum, denial of access to all physical and digital information regarding the case, notice to all firm members of the disqualification of the attorney and instructions to screen her from any information about the case, and withholding of any compensation to the attorney resulting from representation in the matter from which she is being screened.

Rule 1.10 requires that the disqualified lawyer be timely screened from any participation in the matter and be apportioned no part of the fee from the matter. Further, written notice of the screening must be periodically provided to the former client. This notice must include a description of the screening process, a statement of the firm's and of the screened lawyer's compliance with the Rules, a statement that review may be available before a tribunal, and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

C. Conclusion

The Firm can represent Ace Chemical in this litigation. The Firm's representation of the Chamber poses no conflict. Likewise, Mr. Dawes's prior representation of Roadsprinters is not a barrier to the representation. However, the Firm can hire Ashley Kaplan only if she is appropriately screened from this matter.

July 2016 MPT: *In re Whirley*

File

HUMPHRIES & ASSOCIATES, LLP
ATTORNEYS AT LAW
2700 MADISON AVE., SUITE 120
FRANKLIN CITY, FRANKLIN 33017

MEMORANDUM

TO: Examinee
FROM: Della Gregson, Partner
DATE: July 26, 2016
RE: Barbara Whirley matter

Our client, Barbara Whirley, is renting a house. She is a little over halfway through a one-year residential lease and has encountered several problems with the house. Ms. Whirley would prefer not to move and wants the conditions repaired. She needs to know her options under Franklin law to remedy each condition.

In Franklin, specific statutes govern the landlord-tenant relationship. *See* Franklin Civil Code § 540 *et seq*. Both landlords and tenants have certain statutory duties, in addition to any duties they may have under a written lease.

Please draft a memorandum to me analyzing and evaluating Ms. Whirley's options with regard to each of the unrepaired conditions, which are described in the attached client interview summary. If more than one option is available with regard to a specific condition, explain the potential advantages and disadvantages of each option. If an option is *not* available to Ms. Whirley with respect to a particular condition, briefly explain why. Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis.

Humphries & Associates, LLP
Attorneys at Law
2700 Madison Ave., Suite 120
Franklin City, Franklin 33017

Memorandum to File

From: Della Gregson, Partner
Date: July 25, 2016
Re: Summary of interview of Barbara Whirley

Today I met with Barbara Whirley regarding her dispute with her landlord over repairs needed to the rental house where she resides. This memorandum summarizes the interview:

- In January of this year, Whirley rented a three-bedroom, two-bathroom house from Sean Spears. See attached lease.
- Whirley is the only occupant of the home, and she has a dog, Bentley. She and Spears agreed in a separate "Pet Addendum" to the lease that she was allowed to have a dog. Whirley will provide a copy of the Pet Addendum at our next meeting.
- The house has eight rooms: a kitchen, a living room, a master bedroom with bathroom, two additional bedrooms, one additional bathroom, and a laundry room. The master bathroom is accessible through the master bedroom. The second bathroom is in the hallway between the second and third bedrooms. She uses one spare bedroom as her home office and the other as a guest room for family and friends when they visit her (one or two visits per month).
- Whirley is experiencing a number of problems with the residence.
- About two months after she moved in, the toilet in the second bathroom began leaking.
- In late March, she began having problems with the outdoor sprinkler system not functioning.
- In May, she noticed a smell in the guest bedroom. The smell is coming from the carpet near the sliding glass door leading from the bedroom to the backyard. The carpet is damp, and there is a half-inch gap between the bottom of the door and the door frame. Whirley isn't sure whether the door is off its track or whether the door is too small for the door frame. She has not opened the door since she moved in. The door is currently in the

closed position, but she isn't sure whether any of her houseguests may have used the door. When she discovered the gap between the door and door frame and tried to open the door, the door wouldn't budge. She has placed plastic along the door frame to try to keep outside moisture from coming in, to no avail. The carpet near the sliding door is increasingly discolored and smelly, and she has noticed mold growing around the door. The smell is so bad now that no one can use the room.

- Whirley keeps Bentley in the laundry room on weekdays while she is at work, because the laundry room door exits to the backyard and has a "doggy door" that allows Bentley to go in and out of the laundry room throughout the day. Bentley is a golden retriever, and sometimes he gets bored when Whirley is at work and chews on things. Five days ago, Whirley realized that Bentley had sneaked along the side of the washing machine next to the wall and chewed away a two-foot strip of the baseboard and areas of the wall above the baseboard. She has since moved the washing machine closer to the wall to prevent Bentley from having access to the chewed area. Since Spears allowed Whirley to have a dog at the house, she would like to have him take care of the repairs to the wall and baseboard if possible.
- Whirley has notified Spears about the toilet, sprinkler system, and guest bedroom sliding door and carpet, but he has not made any repairs. See attached emails.
- Whirley is now considering making arrangements herself to have the repairs completed. She has obtained an estimate from a handyman, a copy of which is attached.
- Whirley has paid her rent ($1,200) on time every month.
- The average cost to rent a two-bedroom house in the same area is $1,000. The average cost to rent a three-bedroom house in the area is $1,200 (what Whirley is currently paying).
- Whirley does not want to leave her home because it is close to her workplace in a desirable neighborhood with limited rental options.

RESIDENTIAL LEASE AGREEMENT

THIS AGREEMENT (the "Agreement") is made and entered into this 1st day of January 2016 by and between Sean Spears ("Landlord") and Barbara Whirley ("Tenant"). For and in consideration of the covenants and obligations contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. PROPERTY. Landlord owns certain real property and improvements located at 1254 Longwood Drive, Franklin City, Franklin 33015 (the "Premises"). Landlord desires to lease the Premises to Tenant for use as a private residence upon the terms and conditions contained herein. Tenant desires to lease the Premises from Landlord for use as a private residence upon the terms and conditions contained herein.

2. TERM. This Agreement shall commence on January 1, 2016, and shall continue until December 31, 2016, as a term lease.

3. RENT. Tenant agrees to pay $ 1,200 per month by no later than the 3rd day of each month during the lease term . . . .

* * *

8. PETS. No animals are allowed on the Premises, even temporarily, unless authorized by a separate written Pet Addendum to this Agreement. Tenant will pay Landlord $ 25.00 per day per animal as additional rent for each day Tenant violates the animal restrictions by keeping an unauthorized animal. Landlord may remove or cause to be removed any unauthorized animal and shall not be liable for any harm, injury, death, or sickness to unauthorized animals. Tenant is responsible and liable for any damage or required cleaning to the Premises caused by any unauthorized animal . . . .

9. SECURITY DEPOSIT. On or before execution of this Agreement, Tenant will pay a security deposit to Landlord of $ 1,200 . . . . At the end of the lease, Landlord may deduct reasonable charges from the security deposit for damage to the Premises, excluding normal wear and tear, and all reasonable costs associated with repairing the Premises.

* * *

11. DESTRUCTION OF PREMISES. If the Premises become totally or partially destroyed during the term of this Agreement such that Tenant's use is seriously impaired, Landlord or Tenant may terminate this Agreement immediately upon three days' written notice to the other.

* * *

14. PROPERTY MAINTENANCE.

A. Tenant's General Responsibilities. Tenant, at Tenant's expense, shall

(1) keep the property clean;

(2) promptly dispose of all garbage in appropriate receptacles;

. . .

(11) not leave windows or doors in an open position during any inclement weather;

(12) promptly notify Landlord, in writing, of all needed repairs.

B. Yard Maintenance. Unless prohibited by ordinance or other law, Tenant will water the yard at reasonable and appropriate times and will, at Tenant's expense, maintain the yard.

* * *

16. EARLY DEPARTURE FROM PREMISES. If Tenant vacates the Premises before the end of the lease term, Landlord may hold Tenant responsible for all rent payments due for the balance of the lease term, subject to any remedies available to Tenant under Franklin law.

Dated this 1st day of January, 2016

Tenant's Signature Barbara Whirley

Landlord's Signature Sean Spears

Email Correspondence between Barbara Whirley and Sean Spears

From: Barbara Whirley<bwhirl@cmail.com>
To: Sean Spears<sspears65@cmail.com>
Subject: Repair request
Date: February 19, 2016

Hi, Sean. Last weekend I noticed some water on the floor of the hall bathroom between the toilet and the shower. I think the toilet may have a leak. Can you please stop by in the next couple of days to see if the toilet is leaking? I'll put a towel down and make sure to keep the area dry in the meantime. Thanks!

From: Sean Spears<sspears65@cmail.com>
To: Barbara Whirley<bwhirl@cmail.com>
Subject: Repair request
Date: February 27, 2016

Hi, Barbara. I'm sorry it's taken me a while to get back to you. I've been out of town—my oldest son just got married! I'm back in town now, but I'm absolutely snowed under at work this week. I should be able to swing by this weekend—would Saturday morning work for you?

From: Barbara Whirley<bwhirl@cmail.com>
To: Sean Spears<sspears65@cmail.com>
Subject: Leaking toilet
Date: March 4, 2016

Sean, I left two phone messages that last Saturday morning was good for me, and I waited at the house until almost 2 p.m. that day, but you never showed up. The leak in the toilet is getting worse. I've put a plastic bucket behind the toilet to catch the dripping water. Please stop by as soon as you can. I am home most weeknights by 6 p.m. and should be around this weekend. Thanks!

From: Barbara Whirley<bwhirl@cmail.com>
To: Sean Spears<sspears65@cmail.com>
Subject: Needed repairs
Date: March 31, 2016

Sean, I've tried calling you several times over the last few weeks and left voicemail messages about the leaking toilet, but you haven't called me back. The toilet really needs to be fixed. The leak is so bad now that I have to empty the plastic bucket twice a day and sometimes the toilet doesn't flush. In addition, the automatic sprinkler system for the front yard just stopped working, so I have to water the front flower beds by hand two or three times a week. This takes 15–20 minutes and is a real hassle—especially in this hot weather. I do not see any leaks, so I think the sprinkler box has malfunctioned. Can you please figure out what is wrong and get it fixed? Please call or email me about both of these problems ASAP. Thanks!

From: Sean Spears<sspears65@cmail.com>
To: Barbara Whirley<bwhirl@cmail.com>
Subject: Needed repairs
Date: April 6, 2016

Barbara, I'm sorry for the delay, but I've got a lot on my plate right now. I promise I will get by the house to check on everything as soon as I can. Please hold down the fort in the meantime! Thanks!

From: Barbara Whirley<bwhirl@cmail.com>
To: Sean Spears<sspears65@cmail.com>
Subject: Needed repairs
Date: April 27, 2016

Sean, I just got your voicemail message saying you wanted to stop by this weekend. I will be out of town Friday and Saturday, but anytime on Sunday would work for me. See you Sunday!

From: Barbara Whirley<bwhirl@cmail.com>
To: Sean Spears<sspears65@cmail.com>
Subject: Needed repairs
Date: May 4, 2016

Sean, what happened Sunday?! I thought you were going to stop by.... If you can't make it, then please at least have the courtesy to call and let me know! When can you come by?

From: Barbara Whirley<bwhirl@cmail.com>
To: Sean Spears<sspears65@cmail.com>
Subject: Problem with sliding door and other repairs
Date: May 26, 2016

Sean, I have been very patient. The toilet in the hall bathroom has been leaking for the past three months, and the automatic sprinkler system is still not working. These problems are very troubling, but now there's an even bigger problem—the sliding glass door in the guest bedroom is leaking and the carpet is wet and smelly. The smell is so bad that I can't even use the guest bedroom! Plus, mold is growing around the door, and I know that mold can cause health problems, so I have stopped using this room. I think the door and the carpet need to be replaced! Maybe you didn't take seriously the other problems I reported and that's why you haven't made any of the other repairs I've requested. But now a whole room in the house is completely unusable! Why should I pay rent for a 3-bedroom house when all I'm really getting is a 2-bedroom house and my guests have to sleep on the living room couch? If you don't make arrangements to get everything fixed, then I'm going to look into making the repairs myself and take appropriate legal action. I really like living here, but I can't continue to "hold down the fort" any longer!

JB Handyman Services

You Break It, We Fix It!

Estimate 000347

DATE: June 23, 2016

98 Meadow Lane
Franklin City, Franklin 33019
Phone 111-555-4500

TO:
Barbara Whirley
1254 Longwood Drive
Franklin City, Franklin 33015

Description	Amount
Replace toilet water supply valve and hose; Reseal toilet tank	$200
Replace automatic sprinkler control box (6 zones)	$300
Replace sliding glass door, door frame, and insulation; Replace 10 X 12 square-foot carpet and pad adjacent to door	$1,800
Replace 2-foot section of baseboard in laundry room; Patch and repair drywall above damaged baseboard; Retexture and repaint damaged wall to match existing wall	$300

Total Estimate $2,600

THANK YOU FOR YOUR BUSINESS!

July 2016 MPT: *In re Whirley*

Library

Excerpts from Franklin Civil Code

Franklin Civil Code § 540 – Requirement of Tenantability

The lessor of a building intended for human occupation must put it into a condition fit for such occupation and repair all subsequent conditions that render it untenantable.

Franklin Civil Code § 541 – Untenantable Dwellings

A dwelling shall be deemed untenantable for purposes of Section 540 if it lacks any of the following:

(1) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.

(2) Plumbing or gas facilities . . . maintained in good working order.

(3) Heating facilities . . . maintained in good working order.

. . .

(7) Electrical lighting, wiring, and equipment . . . maintained in good working order.

(8) Floors, stairways, and railings maintained in good repair.

(9) Interior spaces free from insect or vermin infestation.

Franklin Civil Code § 542 – Tenant's Remedies for Untenantable Dwellings

(a) If a landlord neglects to repair conditions that render a premises untenantable within a reasonable time after receiving written notice from the tenant of the conditions, for each condition, the tenant may:

(1) if the cost of such repairs does not exceed one month's rent of the premises, make repairs and deduct the cost of repairs from the rent when due;

(2) if the cost of repairs exceeds one month's rent, make repairs and sue the landlord for the cost of repairs;

(3) vacate the premises, in which case the tenant shall be discharged from further payment of rent or performance of other conditions as of the date of vacating the premises; or

(4) withhold a portion or all of the rent until the landlord makes the relevant repairs, except that the tenant may only withhold an appropriate portion of the rent if the conditions substantially threaten the tenant's health and safety.

(b) If the exercise of any of these remedies leads to an eviction action, a justified use of the remedies provided in (a)(1)–(4) in this section is an affirmative defense and may shape the tenant's relief in the event it is determined that the landlord has breached Section 540.

(c) For the purposes of this section, if a tenant makes repairs more than 30 days after giving notice to the landlord, the tenant is presumed to have acted after a reasonable time. A tenant may make repairs after shorter notice if the circumstances require shorter notice.

(d) The tenant's remedies under subsection (a) shall not be available if the condition was caused by the violation of Section 543.

(e) The remedies provided by this section are in addition to any other remedy provided by this chapter, the rental agreement, or other applicable statutory or common law.

Franklin Civil Code § 543 – Tenant's Affirmative Obligations

No duty on the part of the landlord to repair shall arise under Section 540 or 541 if the tenant is in violation of any of the following affirmative obligations, provided the tenant's violation contributes materially to the existence of the condition or interferes materially with the landlord's obligation under Section 540 to effect the necessary repairs:

(1) To keep that part of the premises which the tenant occupies and uses clean and sanitary as the condition of the premises permits.

(2) To properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permits.

(3) Not to permit any person or animal on the premises to destroy, deface, damage, impair, or remove any part of the dwelling unit or the facilities, equipment, or appurtenances thereto.

* * *

Franklin Civil Code § 550 – Eviction Proceedings

(a) In an eviction action involving residential premises in which the tenant has raised as an affirmative defense a breach of the landlord's obligation under Section 540, the court shall determine whether a substantial breach of this obligation has occurred.

(b) If the court finds that a substantial breach of Section 540 has occurred, the court shall (i) order the landlord to make repairs and correct the conditions which constitute the breach, (ii) order that the monthly rent be reduced by an appropriate amount until repairs are completed, and (iii) award the tenant possession of the premises.

(c) If the court determines that there has been no substantial breach of Section 540 by the landlord, then judgment shall be entered in favor of the landlord.

(d) As used in this section, “substantial breach” means the failure of the landlord to maintain the premises with respect to those conditions that materially affect a tenant’s health and safety.

Burk v. Harris

Franklin Court of Appeal (2002)

Defendant Ashley Harris (Tenant) appeals the judgment entered in favor of plaintiff Roger Burk (Landlord) in this eviction action. The issue on appeal is whether the trial court misapplied the law when it found that the conditions proved to exist were nonsubstantial and therefore not a breach of the warranty of tenantability.

Landlord sought possession of the premises, forfeiture of the lease agreement, and past-due rent. Tenant asserted the defense of breach of the warranty of tenantability, set forth in Franklin Civil Code § 540, and the right to withhold rent under § 542(a)(4).

At trial, Tenant testified that the roof and windows of the premises had leaked during the entire term of her tenancy and, as a result, had caused water damage to the walls and floors and had damaged her personal property. Tenant also testified that the thermostat was broken and that the shower leaked. Tenant offered into evidence several letters she sent to Landlord complaining about the leaking roof and other conditions in the apartment, as well as photographs documenting the problems. Landlord denied receiving any such letters, asserted that he had not been inside the premises since Tenant moved in and did not have a key to the residence, and introduced before-and-after photos of repairs he had made upon learning of Tenant's complaints.

The trial court found that the conditions were not "substantial" as defined in Franklin Civil Code § 550. Accordingly, it entered judgment for Landlord for possession of the premises and past-due rent.

In *Gordon v. Centralia Properties Inc.* (Fr. Sup. Ct. 1975), the Franklin Supreme Court held that in every residential lease, there is an implied warranty of tenantability. In *Gordon*, the Franklin Supreme Court further held that a tenant who proves that the landlord has breached the warranty of tenantability is entitled not only to maintain possession of the premises but also to an appropriate reduction of rent corresponding to the reduced value of the premises. The *Gordon* court further held that a tenant is not entitled to a reduction in rent for minor violations that do not materially affect a tenant's health and safety. *Id.*

The *Gordon* decision is codified in the Franklin Civil Code. Under this statutory scheme, when a tenant raises breach of the warranty of tenantability as a defense in an eviction case, the trial court is required to determine whether a substantial breach has occurred. *See* §§ 542(b) and 550(a). If the court finds that there has been a substantial breach, it shall order the landlord to make the repairs and correct the conditions caused by the breach, order that monthly rent be reduced by an appropriate amount, and award the tenant possession of the premises. § 550(b).

Section 540 requires that the landlord of a building intended for human occupation "put it into a condition fit for such occupation and repair all subsequent conditions that render it untenantable." Under § 541, a dwelling is untenantable for human occupancy if it lacks effective waterproofing and weather protection of roof and exterior walls, plumbing maintained in good working order, heating facilities maintained in good working order, and floors maintained in good repair.

Here, the trial court found that the premises were not properly waterproofed from the outside elements, the thermostat did not work, and the shower leaked. The trial court erred when it concluded that these conditions were nonsubstantial. These conditions are not merely cosmetic defects or matters of convenience but affect Tenant's health and safety.

Accordingly, Tenant is entitled to judgment on the defense of breach of the warranty of tenantability, to possession of the premises, and to an appropriately reduced rent. *See* §§ 542(a)(4) and 550(b).

To determine the appropriate reduction in rent, a trial court may either (i) measure the difference between the fair rental value of the premises if they had been as warranted and the fair rental value as they were during occupancy in unsafe or unsanitary condition, or (ii) reduce a tenant's rental obligation by the percentage corresponding to the relative reduction of use of the leased premises caused by the landlord's breach.

Additionally, the trial court must order Landlord to make the repairs necessary under the statute. These are issues for the trial court to determine on remand. Reversed and remanded.

Shea v. Willowbrook Properties LP

Franklin Court of Appeal (2012)

After suffering through two separate bedbug infestations in his apartment, plaintiff Jordan Shea moved out and filed a complaint against his landlord, Willowbrook Properties LP, seeking to recover rent he had paid for the apartment ($1,000/month for 16 months) and out-of-pocket expenses relating to the infestation ($2,000). After a bench trial, the trial court found Willowbrook responsible for the first infestation, but not the second. It awarded Shea a fraction of the damages he sought ($400), limiting his recovery to his documented out-of-pocket expenses and declining to award any rent recovery. Shea appeals.

The facts are as follows: within a few days of entering into a six-month lease with Willowbrook on July 1, 2010, Shea began to suffer from insect bites, which he discovered were the result of bedbugs. He reported this to Willowbrook, which sprayed his apartment, replaced his carpeting, and cleaned his apartment thoroughly to remove the bugs. While this work was being done, Shea stayed at a nearby motel. For several months after Willowbrook cleaned his apartment, Shea experienced no bedbug problems, so he believed that the problem had been corrected. In January 2011, he renewed his lease for an additional year; he then departed for a three-week study-abroad program. Upon his return, he started to get bedbug bites again; the bedbug problem continued throughout the renewal period, but Shea failed to report the second infestation to Willowbrook. He finally moved out of the apartment in October 2011, two months before the end of his lease.

A. Rent

The trial court denied Shea's claim that he was entitled to a full refund of all the rent he had paid over the course of his tenancy. When a landlord breaches the warranty of tenantability and creates an untenantable property, as is alleged here, a tenant has several options: (1) repair and deduct the cost of repairs if the cost of the repairs is less than one month's rent; (2) repair and sue, if the cost of the repairs exceeds one month's rent; (3) vacate the premises and be discharged of paying further rent; or (4) withhold some or all of the rent if the landlord does not make the repairs, provided the conditions substantially threaten the tenant's health and safety. Franklin Civil Code §§ 540, 542. In his lawsuit, Shea sought to recover all the rent he had paid ($16,000) pursuant to the initial and renewed leases.

We believe that the trial court correctly declined to award Shea the rent requested. First, the evidence supports the conclusion that Willowbrook's efforts to address the first infestation (spraying, replacing carpet, and cleaning the apartment) were successful. Shea even renewed his lease for another 12 months, from which the trial court concluded that the apartment was free of the infestation when he renewed and was therefore not untenantable as he claimed. Thus there is no factual basis to support awarding Shea damages for rent paid in 2010 under the first lease.

Nor is there a basis to award damages with respect to the second bedbug infestation, which arose in 2011 after Shea returned from abroad. Shea failed to demonstrate that the 2011 prolonged bedbug infestation occurred through Willowbrook's fault and through no fault of his own. If Shea were responsible, he would have been obligated to resolve the issue himself. *See* Franklin Civil Code § 543 (landlord has no duty to repair under § 540 or 541 if tenant has breached his affirmative obligation to keep premises as clean and sanitary as the condition of premises permits). If Shea believed that his landlord was responsible for the bedbug infestation, he had an obligation to mitigate his damages by promptly notifying Willowbrook to give it an opportunity to resolve the problem. *See Burk v. Harris* (Fr. Ct. App. 2002). Since this did not occur, the trial court declined to find Willowbrook responsible for the second infestation and concluded that Shea was not entitled to vacate the premises under § 542(a)(3). Because Shea retained possession of the apartment and reaped the benefit of staying, he could have been held responsible for the remaining two months of rent under the lease had Willowbrook sought it.

The trial court correctly declined to award Shea any damages related to rent already paid. We affirm the denial of the $16,000 rent reimbursement claim.

B. Out-of-pocket expenses

Shea also requested a total of $2,000 for motel and medication costs he incurred while living in the apartment. However, Shea submitted a receipt only for $400 for the motel room he rented while his apartment was being sprayed for bedbugs during the initial infestation in 2010. He provided no further documentation of his claimed expenses. Therefore, the trial court properly awarded him $400 but appropriately declined to award $1,600 for medication because Shea provided no documentation or explanation of how he came to that number.

Affirmed.

July 2016 MPT: *In re Whirley*

Point Sheet

This July 2016 MPT Point Sheet was provided to bar examiners to assist in grading the examination. It addresses the factual and legal points encompassed within the MPT. While it is illustrative of the discussions that might have appeared in excellent responses constructed by examinees, it is more detailed than examinee responses were expected to be.

In re Whirley

DRAFTERS' POINT SHEET

In this item, the client, Barbara Whirley, seeks legal advice concerning her options for addressing a number of unrepaired conditions in the house that she rents. She is midway through a one-year lease. The problems with the rental house are (1) a leaking toilet in the hall bathroom, (2) a broken outdoor sprinkler system, (3) a leaking sliding glass door and damaged carpet in the guest bedroom, and (4) a damaged baseboard and wall in the laundry room. She has notified her landlord, Sean Spears, of most of the problems, but to date he has not made any repairs.

Examinees' task is to draft an objective memorandum analyzing and evaluating Whirley's options with regard to each of the unrepaired conditions, keeping in mind her desire to have the repairs made and to continue living in the house. For each condition, if an option is not available, examinees must briefly explain why. If more than one option is available with regard to a specific condition, examinees must explain the potential advantages and disadvantages of each such option.

The File contains the memo from the supervising attorney, a summary of the client interview, the written lease agreement, email correspondence between Whirley and Spears, and a repair estimate from a handyman. The Library contains excerpts from the Franklin Civil Code and two cases.

The following discussion covers all the points the drafters intended to raise in the problem.

I. OVERVIEW

No specific formatting guidelines are provided. However, examinees are instructed not to prepare a separate statement of facts but to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect their analyses.

II. THE STATUTES AND CASES

Examinees should apply the following points from the Franklin Civil Code and the cases in their analyses:

- There is implied in every residential lease a warranty of tenantability. *Burk v. Harris* (Fr. Ct. App. 2002) (citing *Gordon v. Centralia Prop. Inc.* (Fr. Sup. Ct. 1975)).
- The *Gordon* decision is codified in Franklin Civil Code § 540 *et seq*. *Burk*.
- A residential landlord must put the dwelling into a condition fit for human occupation and repair all subsequent conditions that render it "untenantable." Fr. Civil Code § 540.
- A dwelling is "untenantable" under § 540 if it lacks any of a number of characteristics, including (1) effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors; (2) plumbing maintained in good working order; and (3) floors, stairways, and railings maintained in good repair. § 541.

- If a landlord fails to repair conditions that render a premises untenantable within a reasonable time after written notice from the tenant of the conditions (typically 30 days but sooner if warranted), the tenant may make repairs that cost less than one month's rent and deduct the cost of the repairs from the rent when due. § 542(a)(1) ("repair and deduct" remedy).
- The "repair and deduct" remedy is not available for damage caused by the tenant, although it is not exclusive and can be combined with other remedies. § 542(d) and (e).
- Alternatively, the tenant may terminate the lease, vacate the premises, and raise the landlord's breach as a defense in a subsequent eviction action by the landlord for failure to pay rent. §§ 542(a)(3), 550. This is known as the "abandonment" remedy.
- If the defect is more serious than would justify or qualify for use of the repair and deduct remedy, a tenant may (a) withhold some or all of the rent until the landlord makes the repairs, if the condition substantially threatens the tenant's health and safety (the "withhold rent" remedy); or (b) make the repairs and sue the landlord to recover the cost of the repairs and any other related damages (the "repair and sue" remedy). § 542(a)(2) and (4); *Shea v. Willowbrook Prop. LP* (Fr. Ct. App. 2012).
- A landlord has no duty to repair under §§ 540 or 541 if the tenant violates any of several affirmative obligations and the violation contributes materially to the condition or interferes with the landlord's obligation under § 540 to make the necessary repairs. § 543.
- A tenant's statutory affirmative obligations include (1) properly using and operating all electrical, gas, and plumbing fixtures and keeping them in a clean and sanitary condition; and (2) not permitting any person or animal to destroy, deface, damage, impair, or remove any part of the dwelling unit or the facilities, equipment, or appurtenances thereto. § 543.
- In an eviction action alleging a failure to pay rent, if the tenant raises as a defense the landlord's violation of § 540 (breach of the warranty of tenantability), then the court must determine whether a substantial breach of these obligations has occurred. § 550(a).
- "Substantial breach" means the failure of the landlord to maintain the premises in a manner that materially affects a tenant's health and safety. § 550(d).
- If the court finds that a substantial breach has occurred, the court must (i) order the landlord to make repairs and correct the conditions which constitute the breach, (ii) order that the monthly rent be reduced by an appropriate amount until repairs are completed, and (iii) award the tenant possession of the premises. § 550(b).
- To determine the appropriate reduction in rent, a trial court may either (i) measure the difference between the fair rental value of the premises if they had been as warranted and the fair rental value as they were during occupancy in unsafe or unsanitary condition, or (ii) reduce a tenant's rental obligation by the percentage corresponding to the relative reduction of use of the leased premises caused by the landlord's breach. *Burk*.
- If, on the other hand, the court determines that the landlord has not substantially breached § 540, then judgment must be entered in the landlord's favor. § 550(c).

III. ANALYSIS

Examinees' analyses should include a discussion of the parties' statutory rights and obligations (see above) and their contractual rights and obligations under the lease agreement:

- Whirley's obligation to pay monthly rent of $1,200 (which she has done on a timely basis) (§ 3)
- Whirley's obligation to keep unauthorized animals off the premises (discussed in subsection D below) (§ 8)
- Spears's right to deduct the cost of making non-routine repairs from Whirley's security deposit at the end of the lease (§ 9)
- Either party's right to terminate the lease if the premises become "totally or partially destroyed" (§ 11)
- Whirley's obligation to not leave windows or doors in an open position during inclement weather (§ 14.A(11))
- Whirley's obligation to promptly notify Spears of needed repairs (§ 14.A(12))
- Whirley's obligation to water and maintain the yard (§ 14.B)
- Spears's right to hold Whirley responsible for rent payments due for the balance of the lease term if Whirley vacates the premises before the end of the lease term (§ 16)
- As a preliminary matter, examinees should note that, with the exception of the laundry room damage caused by her dog, Whirley has promptly notified Spears of the conditions. Therefore, she has satisfied her obligation under § 14.A(12) of the lease agreement.

There are four unrepaired conditions: (1) the leaking toilet in the hall bathroom, (2) the broken automatic sprinkler system for the front yard, 3) the leaking sliding glass door and damaged carpet in the guest bedroom, and (4) the baseboard and wall damage in the laundry room caused by her dog.

The possible remedies available to a tenant in Whirley's position include (1) repair and deduct, (2) make the repairs herself and sue the landlord for damages, (3) abandon the premises, or (4) withhold some or all rent until the landlord makes necessary repairs. § 542. However, as discussed below, not all of these options are available for each of the four unrepaired conditions.

The following analysis is organized by unrepaired condition, but examinees could also organize their analyses according to each of the above remedies and discuss the unrepaired conditions as they relate to each potential remedy.

A. Leaking Toilet

- The client interview summary and the emails between Whirley and Spears establish that the toilet in the hall bathroom has been leaking for five months, the leak has gotten worse, and Spears has failed to repair the toilet. Whirley has to keep a bucket behind the toilet to catch the dripping water and empty it twice a day, and sometimes the toilet doesn't flush because of the leak.

- A landlord must maintain plumbing facilities "in good working order." Fr. Civil Code § 541(2). A leaking, partially inoperable toilet cannot be said to be "in good working order." *See, e.g.*, *Burk* (broken thermostat and leaking shower constituted a substantial breach of the warranty of tenantability).
- Examinees should note that Whirley has an affirmative duty under Civil Code § 543 to "properly use and operate all . . . plumbing fixtures and keep them as clean and sanitary as their condition permits," but that there is no evidence that Whirley breached that duty. Rather, the toilet developed a leak and Whirley has acted responsibly by not only reporting the leak to Spears (over and over again) but also by putting down a towel and a bucket to ensure that the leak does not damage the bathroom floor or walls.
- The estimated cost to fix the leak is $200—well below Whirley's monthly rent of $1,200. Moreover, her emails demonstrate that Whirley has given Spears more than 30 days' notice, thus satisfying the "reasonable time" requirement in § 542(a) and (c).
- Therefore, Whirley is entitled to have her handyman fix the toilet and then deduct the $200 cost from her next month's rent. While she could also choose to abandon the house and be discharged from paying rent under the lease, per § 542(a)(3), examinees should note that she wants to stay in the house because it is close to her work and in a good neighborhood with limited rental options. The "withhold rent" remedy is not available because the condition is not serious enough to justify withholding rent and not making the repair. Nor can she make the repair and then sue Spears, since the repair cost is less than one month's rent. Therefore, "repair and deduct" is her best option for addressing the leaking toilet.

B. Broken Automatic Sprinkler System

- About three months into the lease, the automatic sprinkler system for the front yard stopped working due to the control box malfunctioning. *See* client interview summary; email correspondence. Whirley now has to manually water flower beds two or three times a week. This requires her to stand outside for 15 to 20 minutes to make sure the flower beds are properly watered, which is inconvenient—indeed, "a real hassle" per her email to Spears dated March 31, 2016.
- The lease agreement expressly imposes responsibility for watering and maintaining the yard upon Whirley (§ 14.B). However, the lease agreement is silent as to who is responsible for making repairs to the automatic sprinkler system.
- Outdoor sprinkler systems are not included in the list of conditions for which a landlord is responsible under Civil Code § 541. Nor is it likely that a broken automatic sprinkler system would pose a material threat to health and safety under § 550, and thus its nonoperative condition does not signify a breach of the warranty of tenantability.
- The court in *Burk*, citing *Gordon*, noted that "a tenant is not entitled to a reduction in rent for *minor* violations that do not materially affect a tenant's health and safety" (emphasis added). Nor do conditions that are cosmetic or "matters of convenience" breach the warranty. *Burk.* A broken automatic sprinkler system would likely be considered merely an inconvenience.

- Because a landlord is not required to maintain an outdoor sprinkler system under Civil Code § 541 and failure to do so does not constitute a breach of the warranty of tenantability, and because Whirley is responsible under the lease for watering and maintaining the lawn, she probably has no recourse against Spears with regard to the broken sprinkler control box.
- The estimate to repair the sprinkler control box is $300. This is below the dollar limit for the "repair and deduct" remedy, but that remedy is not available. Therefore, if Whirley wants a working sprinkler system, she will have to pay for the repair herself and may not deduct the cost from her rent.

C. Guest Room Sliding Door and Carpet

- The guest bedroom sliding door/carpet problems are the most serious and costly conditions.
- It is unclear exactly what is wrong with the door and how the problem occurred. According to the client interview summary, there is a half-inch gap between the bottom of the door and the door frame but it is not known how that occurred. Whirley denies using the door, but doesn't know if one of her guests may have used it or done something that caused the leak.
- Civil Code § 541 imposes a duty on Spears to provide "[e]ffective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors." Conversely, the lease imposes a duty on Whirley to not leave windows or doors open during inclement weather (§ 14.A(11)). She is also obligated to prevent anyone from damaging or impairing any part of the dwelling, per Civil Code § 543(3).
- If Spears failed to waterproof the door frame and keep the door from leaking, then he has breached the warranty of tenantability (§ 540) and violated Civil Code § 541. *See Burk* (water damage to walls and floors caused by leaking roof and windows violated the warranty of tenantability). If, on the other hand, one of Whirley's guests damaged the door, then Whirley would be in violation of the lease agreement and Civil Code § 543.
- The cost to replace the door, door frame, insulation, and rotten carpet is $1,800, well in excess of Whirley's monthly rent of $1,200. Thus, regardless of who is at fault for the condition of the door, the "repair and deduct" remedy is not available to Whirley.
- One could argue that the damage to the guest bedroom has resulted in a partial destruction of the house under § 11 of the lease agreement and that Whirley might thus be entitled to vacate with three days' written notice. But she doesn't want to move, and it is questionable whether a condition that renders one of eight rooms unusable qualifies as "destruction" of a portion of the premises. If not, then Whirley would be liable for rent through the end of the lease term pursuant to § 16 of the lease agreement.
- The door and carpet need to be replaced, and Whirley has made clear that she doesn't want to move. She thus has two options: (1) withhold an appropriate portion of her rent until Spears makes the repairs (she cannot withhold her entire rent because the house is not completely "untenantable"), or (2) pay the cost to restore the guest bedroom and file an action against Spears seeking reimbursement for the cost of the repairs and any other damages she may have. Both options involve some risk, as discussed below.

Option 1: Withhold Rent

- If Whirley chooses to withhold a portion of rent, there are two ways to determine the amount of the reduction: (1) measure the difference between the fair rental value of the premises if they had been as warranted and the fair rental value as they were during occupancy in unsafe or unsanitary condition, or (2) reduce the tenant's rent by the percentage corresponding to the relative reduction of use of the leased premises caused by the landlord's breach. *Burk*.
- In her email correspondence with Spears, Whirley makes the point that she should not be paying rent for a three-bedroom house when all she is getting is a two-bedroom house due to the guest bedroom's condition. The client interview indicates that the average rent for a two-bedroom house in the same area would be $1,000, or $200 a month less than what she now pays.
- Thus, if she opts to withhold rent, she should pay $1,000/month until the repairs are made.
- If Whirley decides to withhold some of the rent, then Spears could file an eviction action seeking to force her to vacate and pay back rent and awarding Spears possession of the house.
- If the court were to find that a substantial breach of the warranty had occurred, it would likely (i) order Spears to make repairs and correct the conditions which constitute the breach, (ii) order that monthly rent be limited to the reasonable rental value of the premises (thereby likely ratifying the reduced rent that Whirley would have been paying), and (iii) award Whirley possession of the house.
- However, if the court were to determine that Spears has not substantially breached Civil Code § 541 or the warranty of tenantability (i.e., that one or more of Whirley's guests caused the problem with the door), then it would enter judgment in favor of Spears.

Option 2: Repair the Guest Bedroom and Sue Spears

- In Whirley's situation, the "repair and deduct" remedy is not available, but "repair and sue" is.
- In *Shea*, the tenant sued his landlord seeking to recover rent he had paid for the apartment and out-of-pocket expenses relating to insect infestation.
- There, the landlord contested the amount of damages. The trial court awarded the tenant $400 in damages for the cost of the motel room that he rented during an infestation, but denied his claim for the rent paid during the tenancy. The appellate court affirmed.
- Although the condition in the guest bedroom is serious and interferes with guests visiting, Whirley has not yet incurred any out-of-pocket expenses. Examinees should note that to recover out-of-pocket expenses, she would need to have documentation of the expenses, such as receipts. *Shea.*
- One benefit of making the repairs now is that the guest bedroom will be usable again. In addition, by making the repairs, Whirley will avoid the risk of a possible eviction. The disadvantages of this option include the up-front out-of-pocket cost to Whirley and the possibility that she will not obtain reimbursement from Spears if she sues him and loses.

Whirley's Choice of Remedies

- Ultimately, Whirley will have to decide whether to withhold a portion of her rent or make the repairs to the guest bedroom herself and then sue Spears for damages.
- There is no "right" decision with regard to the two options. Both have advantages and disadvantages. If examinees discuss the benefits and risks of each option, as set forth above, then they should receive full credit for this portion of their analysis regardless of which option they ultimately recommend for the client.

D. Baseboard and Wall Damage in Laundry Room

- The client interview summary states that Whirley keeps her dog, Bentley, in the laundry room while she is at work. Recently, Whirley discovered that Bentley had sneaked along the side of the washing machine next to the wall and chewed away a two-foot strip of the baseboard and areas of the wall above the baseboard. Whirley has since moved the washing machine closer to the wall to prevent Bentley from reaching the chewed area.
- Whirley has not mentioned the damaged laundry room baseboard and wall to Spears because she just noticed it, and she isn't sure who is responsible for repairing it.
- Examinees should note that the lease agreement prohibits Whirley from having unauthorized animals on the premises. Without a written agreement between the parties permitting Whirley to keep a dog, she would be in violation of § 8 of the lease agreement regardless of whether Bentley had caused any damage. She would owe Spears $25 per day for each day that Bentley was at the house, and Spears could have Bentley removed from the house.
- Whirley says that she and Spears entered into a separate written "Pet Addendum" to the lease agreement and that she will provide a copy at her next meeting with the partner. Thus, the issue of whether Bentley is authorized or unauthorized probably won't be a factor, but it is definitely a loose end that needs to be tied up.
- Section 8 of the lease agreement provides that Whirley is responsible for any damage "caused by any unauthorized animal" (emphasis added). But that doesn't absolve her from responsibility for damage caused by an authorized animal, because Civil Code § 543 prohibits Whirley from allowing "any . . . animal" (whether or not authorized) to cause damage to the premises. Therefore, the damage caused by the dog is clearly Whirley's responsibility, not Spears's.
- Whirley has two options: (1) repair the baseboard and wall herself and pay the cost; or (2) leave the condition unrepaired with the expectation that the damage is not "normal wear and tear" and that Spears will make the repairs at the end of the lease and deduct the cost from her $1,200 security deposit, per § 9 of the lease agreement.
- A big advantage of repairing the wall herself is that Whirley can choose who makes the repairs and thus control the cost. Also, the repairs will be made now, not later. If she waits until the end of the lease for Spears to make the repair, he may charge her more than she would have paid.

- The total cost of the repairs is only $300, per the handyman estimate, and the damage caused by Bentley is clearly Whirley’s responsibility. Her best bet would be to have the repairs made now.

IV. CONCLUSION

Examinees should conclude that (i) “repair and deduct” is Whirley’s best option with regard to the toilet leak in the hall bathroom; (ii) she probably cannot compel Spears to repair the outdoor sprinkler system, but is not obligated to fix it herself; (iii) she has two options with regard to the guest bedroom sliding door and carpet (withhold a portion of her rent or make the repairs herself and sue Spears to recover damages), both of which have advantages and disadvantages; and (iv) she is clearly responsible for repairing the baseboard and wall damage caused by her dog and should make the repairs now rather than allowing Spears to make the repairs at the end of the lease and deduct the cost from her security deposit.

February 2016 MPT: *In re Anderson*

File

CALVETTI, LAWRENCE & MASTERSON
Attorneys at Law
84 Richmond Avenue, Suite 1300
Lafayette, Franklin 33526

MEMORANDUM

To: Examinee
From: David Lawrence
Date: February 23, 2016
Re: Workers' Compensation Claim

Our client Nicole Anderson seeks legal advice regarding a workers' compensation claim that is being filed against her by Rick Greer, a handyman hired by Anderson to perform general maintenance and repair work for her residential rental properties. Greer was injured while painting the exterior of one of Anderson's rental houses.

Under the Franklin Workers' Compensation Act, codified in the Franklin Labor Code § 200 *et seq.*, employers are required to maintain insurance coverage for employees who may sustain injuries arising out of and in the course of their employment. When employees are injured on the job, they can submit workers' compensation claims and be paid for their lost wages during the period in which their injuries prevent them from returning to work, as well as their medical costs.

Workers' compensation applies only to employees; it does not apply to independent contractors. Anderson did not maintain workers' compensation insurance coverage because she did not believe she was required to insure Greer against injury. If Greer is found to be Anderson's employee, Anderson could face substantial personal liability as well as penalties under the Workers' Compensation Act for failing to provide this coverage.

Please draft a memorandum to me in which you analyze whether Greer would be considered an employee of Anderson under the applicable statutory provisions and case law. Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis and conclusion.

Transcript of client interview: Nicole Anderson
February 19, 2016

Attorney Lawrence: Ms. Anderson, it's a pleasure to meet you. I understand that you're seeking our assistance with regard to a workers' compensation claim that is being asserted against you. Why don't you tell me a little more about your business and then we can talk about the claim.

Nicole Anderson: Well, about five years ago, I got involved in the rental property business when I couldn't sell the house that I owned and lived in. I couldn't afford two mortgages, so I ended up renting out my old house. I had such a positive experience as a first-time landlord that I decided to invest in additional rental properties. Over the past five years, my rental property business has steadily grown, and I now own 11 rental properties, all of them single-family houses, here in Lafayette.

Initially, when I had only a couple of rental properties, I personally handled most of the basic maintenance work like painting and replacing trim, basic plumbing problems, and the like. If a particular project was too complicated or time-consuming, I'd recruit family members to help me or hire out the work to various handymen as needed. About three years ago, I reached the point where I had too many rental properties to keep up with as far as basic maintenance and repair work, and I was tired of dealing with different handymen, some of whom were less reliable than others. So I decided to find someone who could perform all of the maintenance and repair work on my rental properties. That's when I found Rick Greer.

Atty: And is Mr. Greer the person who was injured and who is attempting to assert a workers' compensation claim against you?

Client: Yes, I just received this claim form. [Workers' compensation claim form attached.]

Atty: How did you come to find him?

Client: I saw an ad in the online Yellow Pages for "Greer's Fix-Its." After speaking with him and checking his references, I felt confident that he would do a good job at a reasonable price.

Atty: How long has Mr. Greer provided handyman services for you?

Client: Since June of 2013.

Atty: Did the two of you enter into any kind of written agreement?

Client: Not anything formal, but we did discuss the parameters of his work by email. I've brought a copy of the emails in which we discussed what he was going to do, how he was going to be paid, and what the general arrangement would be.

Atty: Great. Let me take a look at it . . . . The email says Mr. Greer was going to perform general maintenance and repair work. What specific kinds of services has he provided?

Client: He does a lot of stuff—everything from cleaning and repairing rental houses between occupancies to minor renovations and upgrades, in addition to basic maintenance and general upkeep such as painting, cleaning gutters, simple plumbing and electrical work, hauling debris to the dump, and other odds and ends. I also require him to inspect the exterior of each of the properties monthly, using a checklist that I've provided to him.

Atty: And how is he paid?

Client: We negotiate the payment amount for each project. I always pay him by check when the work is done. Sometimes I pay him on an hourly basis at a rate of $25 per hour, and other times I pay him a flat rate by the project. For instance, I pay him a flat fee of $200 per room to paint standard interior rooms. If a room is large or the ceiling or trim needs to be painted in addition to the walls, then we negotiate a higher fee. For plumbing and electrical projects, I pay him by the hour. I also reimburse him for any materials that he may need to purchase in connection with each project, such as paint, wiring, and lumber. I've agreed to pay him a minimum of $250 per month, even if he doesn't do 10 hours of work in that month, to be sure that he is always available to me.

Atty: Do you withhold any taxes from the money you pay him?

Client: No, I always thought he was responsible for paying his own taxes.

Atty: How often does he perform handyman services for your rental properties, and how many hours a week or a month would you say that it works out to?

Client: Typically, he handles around five projects a month, sometimes more, sometimes less. Each project is different, and some take more time than others, but I'd estimate that on average he spends about 10 hours a month working on projects at my rental properties. When a tenant moves out, which happens about once every 18 months or so, he can spend as little as 5 hours or as much as 15 to 20 hours getting the place ready to re-rent, depending on how well the tenant took care of the house. With 11 rental properties, there's a pretty steady flow of necessary maintenance and repair work. When something comes up, I call him and then he works me into his schedule and gets the project done.

Atty: What was Mr. Greer doing on the day he was injured?

Client: He was painting the front exterior of my rental house on Clover Circle.

Atty: What happened that day?

Client: Well, on February 11, I was at the rental house on Clover, telling him what I wanted him to do. I told him to be sure to mask the windows, that I didn't want rollers but a narrow brush to paint the trim, and to apply three coats of paint.

Atty: Do you always give him detailed directions like that?

Client: Not always, but I'm pretty particular. I want my properties to look nice, so I want the job done right. This was an expensive rental, and I wanted it to look really nice.

Atty: Okay, what happened next?

Client: I walked around the corner of the house, and a few minutes later I heard Rick yell. I ran back and found that he had fallen off a ladder and was hurt. He had broken his right arm and was in a lot of pain. I got him into my car and drove him to the hospital. The hospital took him into the emergency room right away.

Atty: What happened next?

Client: I called his wife from the hospital, and when I knew she was coming, I went home. Later on I tried to reach Rick and his wife by phone. They never answered and didn't return the messages I left. The next day, I called Jim, a friend of mine who owns an eight-unit apartment complex and uses Rick on repair and maintenance projects for that complex. Jim told me that he had spoken with Rick, who had said that his arm would be in a cast for at least four weeks and that he probably wouldn't be able to work for another two to four weeks after the cast came off, while he underwent physical therapy.

Atty: Who owns the ladder?

Client: As far as I know, Rick does.

Atty: Do you ever provide him with any tools for the work he performs for your rental houses?

Client: Sometimes on paint jobs, when there's a particular color that I want Rick to use, I've bought the paint from the hardware store to make sure that it's the right color, instead of having Rick buy it and then reimbursing him. I've also picked out ceiling fans, faucets, and other fixtures for rental properties on occasion, but that's about it. Rick usually provides everything else. He has one of those big built-in toolboxes on the bed of his pickup truck with all kinds of tools, everything from power drills and big saws to wrenches and screwdrivers. I think he keeps a lot of tools on hand for bigger projects that come up, like the remodel that he completed at Jim's apartment complex last year.

Atty: You mentioned that you sometimes select the paint color and fixtures such as ceiling fans and faucets on some of Mr. Greer's projects. Do you also get involved in other aspects of his work?

Client: It really depends. When it comes to paint color, the installation of a ceiling fan, or the way I want something to look when it's finished, I usually get involved in the process to make sure the project turns out the way I want it to, but I don't micromanage him or anything like that. He's very good at what he does and he knows what he's doing. If I tell him that a toilet is leaking, he figures out what the problem is and then fixes it. I work full-time as an accountant, and my job keeps me very busy, so most of the time I just swing by the property after Rick's done to make sure the work got done right before paying him for the work.

Atty: When did you find out that he was going to file a workers' comp claim against you?

Client: Not until yesterday, when he faxed over a workers' compensation claim form and asked me to fill out the "Employer" section. I was really shocked when I received the form because it never occurred to me that Rick might consider himself to be an employee of mine. I haven't withheld taxes or obtained any insurance coverage for Rick, and I don't even want to think about what it would cost to pay his medical bills or lost wages.

Atty: I understand your concerns. I think I have a pretty good idea of the professional arrangement between you and Mr. Greer. I'm going to need to research the legal issues surrounding his workers' compensation claim. I will give you a call next week to let you know what I think the next steps are.

Client: Okay. I look forward to hearing from you. And thanks so much for your help with this.

Email Correspondence Between Anderson and Greer

From: Nicole Anderson<nicorentals@cmail.com>
Date: 17 June 2013, 9:00 a.m.
To: Rick Greer <Rick@Greersfixits.com>
Subject: Handyman Work

Hi, Rick. Great talking with you earlier this week! I called your references, and they had nothing but good things to say about you. So I'd like to go ahead and have you help me with general repair and maintenance projects at my rental properties. I think I already told you this, but all are single-family houses with the usual ongoing maintenance and repair needs. I'm not sure how often I'll need your help, but I look forward to working with you.

Nicole

From: Rick Greer <Rick@Greersfixits.com>
Date: 17 June 2013, 11:15 a.m.
To: Nicole Anderson<nicorentals@cmail.com>
Subject: Handyman Work

Sounds good. Just let me know when you need my services, and I will make sure to get out to the property and get the problem handled. As I told you, I charge all my customers $25/hour for electrical and plumbing work and routine maintenance and repairs. We can discuss the price of other projects as they come up.

Rick

From: Nicole Anderson<nicorentals@cmail.com>
Date: 18 June 2013 8:15 a.m.
To: Rick Greer <Rick@Greersfixits.com>
Subject: Handyman Work

Okay. If you need to do any work on the inside of a rental house, I'll need to coordinate with my tenant to make sure that someone is there to let you in and that it's a convenient time for the tenant and for you. Exterior projects like gutter work can be done basically at your convenience. If the tenant has a dog, I just need to give the tenant a heads-up so that we can make sure the dog is secured before you show up. Will call you as soon as I need your help. Thanks!

Nicole

STATE OF FRANKLIN
DEPARTMENT OF LABOR RELATIONS
DIVISION OF WORKERS' COMPENSATION

WORKERS' COMPENSATION CLAIM FORM (DWC 1)

Employee: Complete the **"Employee"** section and give the form to your employer. Keep a copy and mark it **"Employee's Temporary Receipt"** until you receive the signed and dated copy from your employer.

Employee—complete this section and see note above.

1. Name Rick Greer Today's date February 18, 2016
2. Home address 13269 Cabot Road, Lafayette, Franklin 33527
3. Date of injury February 11, 2016 Time of injury 9:00 a.m. ______ p.m.
4. Address and description of where injury happened I fell from a ladder at 3025 Clover Circle, Lafayette, Franklin 33529, while painting a house for my employer, Nicole Anderson.
5. Describe injury and part of body affected broken right arm

6. Signature of employee Rick Greer

Employer—complete this section and see note below.

7. Name and address of employer ______
8. Date employer first knew of injury ______
9. Date claim form was provided to employee ______
10. Date employer received claim form ______
11. Name and address of insurance carrier ______
12. Insurance policy number ______
13. Signature of employer representative ______
14. Title ______ 15. Telephone ______

Employer: You are required to date this form and provide copies to your insurer or claims administrator and to the employee, dependent, or representative who filed the claim within **five working days** of receipt of the form from the employee.

SIGNING THIS FORM IS NOT AN ADMISSION OF LIABILITY.

❑ Employer copy ❑ Employee copy ❑ Claims administrator ❑ Temporary receipt

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Library

Excerpts from the Franklin Workers' Compensation Act
Franklin Labor Code § 200 *et seq*.

Article 2. Employers and Employees

* * *

§ 251. "Employee" means every person in the service of an employer under any appointment or contract of hire, whether express or implied, oral or written . . . .

* * *

§ 253. "Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.

* * *

§ 257. Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.

* * *

§ 280. The provisions of this statute shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.

Article 7. Workers' Compensation Proceedings

* * *

§ 705. The following are affirmative defenses, and the burden of proof rests upon the employer to establish them: (a) That an injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his injury actually performing service for the alleged employer. . . .

Robbins v. Workers' Compensation Appeals Board

Franklin Court of Appeal (2007)

This is an appeal from a decision of the Franklin District Court affirming an order of the Workers' Compensation Appeals Board. The Board held that appellant Matthew Robbins was an "independent contractor" and not an "employee" for purposes of the Franklin Workers' Compensation Act (Franklin Labor Code § 200 *et seq*.) and thus was not eligible for workers' compensation benefits. We affirm.

Background

Robbins injured his head and lower back when he fell from a roof while trimming bushes at the Maple Leaf Diner in the Town of Jefferson. Robbins filed a workers' compensation claim against the diner's owner, Alana Parker.

Parker called no witnesses at the workers' compensation hearing. Robbins testified that he has been gardening, painting, fixing pipes, and doing graffiti removal for 25 years. His clients are people who either know him or are referred to him by word of mouth. He charges by the hour, but sometimes he contracts for an entire job. He usually does the same type of work but for different people each day. Robbins does not have a roofer's license or a general contractor's license. He has no office and no employees, and he does not advertise.

Parker arranged for Robbins to trim the bushes along the roofline of the diner on two occasions. The first time was in August 2004, and the second, July 15, 2005, was the day he fell.

In 2004, Parker paid Robbins by the hour, although they did not discuss the number of hours he would work. Nor did they discuss the hourly rate until he was finished. On the 2004 visit, Parker paid Robbins $150. She did not deduct taxes from his pay. He pays his own taxes. Parker and Robbins did not discuss at that time when he would provide services in the future, agreeing only that Parker would contact him when his services were needed. On the second visit, in July 2005, Parker and Robbins did not discuss either the number of hours to be worked or the rate. As it turned out, Robbins was not paid for that visit because, after his fall, he did not complete the work and never sent a bill. Robbins had no plans to do additional work at the diner in the future, other than to trim bushes whenever Parker asked.

On the day he fell, Robbins brought all the equipment he needed to do the job, including a trimmer, a rake, a broom, a leaf blower, and a ladder. He arrived in his own truck. Parker did not tell him to bring an assistant that day, how to do the job, or how long it would take. She did not tell him to arrive at any given time, only that he should arrive before the diner opened.

Discussion

The question before us is whether Robbins was an employee or an independent contractor when he was injured. The Board's decision that Robbins was an independent contractor (and therefore not entitled to workers' compensation benefits) will be upheld if it is supported by substantial evidence in the record.

Workers' compensation laws protect individuals who are injured on the job by awarding prompt compensation, regardless of fault, for work injuries. *Raleigh v. Juneau Enterprises, Inc.* (Fr. Ct. App. 1992). The principal test of an employment relationship is whether the person to whom service is rendered has the "right to control" the manner and means of accomplishing the result desired. Franklin Labor Code § 253. The existence of such right of control, not the extent of its exercise, gives rise to the employer-employee relationship. However, this test is not exclusive. Several secondary factors, the "*Doyle* factors," *infra*, also are relevant to one's status as an employee or an independent contractor.

Franklin courts have liberally construed the Workers' Compensation Act to extend benefits to persons injured in their employment. *Id*. § 280. Because workers' compensation statutes are remedial, public policy considerations also influence the determination of whether an individual is entitled to workers' compensation protections.

Right-of-Control Test

We begin with the right-of-control test set forth in *Doyle v. Workers' Compensation Appeals Board* (Fr. Sup. Ct. 1991). *Doyle* involved unskilled harvesters who worked for the defendant grower. *Doyle* held that, because all meaningful aspects of the relationship (e.g., price, crop cultivation, fertilization and insect prevention, payment, and the right to deal with buyers) were controlled by the defendant grower, the grower exercised "pervasive control over the operation as a whole," and the unskilled harvesters were its employees. The harvesters' only decisions were which plants were ready to pick and which needed weeding. The harvesters' work was an integral component of the grower's operations, over which the grower exercised pervasive control, and the purported "independence" of the harvesters from the grower's supervision was not a result of superior skills but was rather a function of the unskilled nature of the labor, which required little supervision.

Here, Robbins was engaged to produce *the result* of trimming the bushes. Neither party presented evidence that Parker had the power to control the manner or means of accomplishing the trimming. Indeed, it is Parker's inability to control the means and manner by which Robbins provided the trimming service that puts the facts here in stark contrast to those in *Doyle*. Robbins testified that in general, no one tells him how to do his work on the jobs he accepts and that Parker did not tell him how to do the trimming at the diner. Once he accepted a job, he testified, he completed it without direction from the person for whom he was rendering the service. Thus, the lack of supervision here was not a function of the unskilled nature of the job, as in *Doyle*. Nor does the fact that Parker asked Robbins to arrive early suggest that Parker controlled any aspect of the trimming. It was Robbins who chose both the date and time to perform the service. In short, under the principal test of the employment relationship, Parker did not have the right to control Robbins's work.

Doyle Factors

In addition to the right-of-control test set forth in *Doyle*, we also must analyze the secondary factors identified in that case to determine whether Robbins was an independent contractor or an employee. These "*Doyle* factors" are derived largely from the Restatement (Second) of Agency and from other jurisdictions.

They are (1) whether the worker is engaged in a distinct occupation or an independently established business; (2) whether the worker or the principal supplies the tools or instrumentalities used in the work, other than those customarily supplied by employees; (3) the method of payment, whether by time or by the job; (4) whether the work is part of the regular business of the principal; (5) whether the worker has a substantial investment in the worker's business other than personal services; (6) whether the worker hires employees to assist him; (7) whether the parties believe they are creating an employer-employee relationship; and (8) the degree of permanence of the working relationship. The *Doyle* factors are not to be applied mechanically as separate tests but are intertwined, and their weight often depends on particular combinations of the factors. The process of distinguishing employees from independent contractors is fact-specific and qualitative rather than quantitative.

In applying the *Doyle* factors to the facts at hand, we note that, first, Robbins performed his work for Parker as part of his gardening services, which he has been doing independently for approximately 25 years. Although Robbins does not advertise, he has several different clients who telephone or email him to perform specific jobs. Not only does he have many other clients, but Parker did not ask him to perform any service other than trimming the bushes.

Second, Robbins supplied the equipment he used for the job; and they were not tools a restaurant would commonly have.

Third, he was not hired by the day or hour, or even on a regular basis. Payment was only discussed after the work was complete. Sometimes Robbins charged by the hour and sometimes by the job, and he was paid on a job-by-job basis, with no obligation on the part of either party for work in the future. Taxes were not deducted from his payment. Robbins estimates and pays his own taxes.

Fourth, in concluding that the harvesters in *Doyle* were employees, the court found that their work constituted "a regular and integrated portion of [the grower's] business operation, in that [its] entire business was the production and sale of agricultural crops." Although seasonal, the work in *Doyle* was a permanent part of the agricultural process, and many harvesters returned to work for Doyle each year—all of which led the court to conclude that the "permanent integration of the workers into the heart of Doyle's business is a strong indicator that Doyle functions as an employer." By contrast, Robbins is a gardener whose work is wholly unrelated to the restaurant business; it constitutes only occasional, discrete maintenance. Robbins, for example, was asked to work when the diner was closed so that his work would not interfere with the diner's *regular business*.

We note that Robbins has 25 years' experience in his gardening business and a substantial investment in equipment and other aspects of the business, satisfying the fifth factor.

Although Robbins did not hire employees to assist him (the sixth *Doyle* factor), this alone does not negate the overwhelming evidence satisfying the other *Doyle* factors.

Neither Robbins nor anyone else testified that the parties believed they were creating an employer-employee relationship (the seventh *Doyle* factor). This factor is neutral.

With regard to the eighth and final *Doyle* factor, the degree of permanence in the working relationship, no date for Robbins's return was specified after the first time he trimmed bushes at the diner. Robbins understood that he would be contacted only when his services were needed, with the result that he worked for a circumscribed period of time with no permanence whatsoever in his working relationship with Parker. Indeed, Robbins had done trimming work for Parker only twice in the space of nearly a year, and there were no plans for him to return to the diner. Thus, Robbins's profit or loss depended on his scheduling, the time taken to perform the services, and his investment in tools and equipment.

Altogether, six of the *Doyle* factors support the Board's conclusion that Robbins was an independent contractor because he "render[ed] service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result [was] accomplished." Franklin Labor Code § 253.

Policy Consideration

Finally, in deciding whether a worker is an employee or an independent contractor, the court must consider the remedial purpose of workers' compensation laws, the class of persons intended to be protected, and the relative bargaining positions of the parties. The policy underlying Franklin's workers' compensation law indicates that the exclusion of independent contractors from the law's benefits should apply to those situations where the worker had control over how the work was done and, in particular, had primary power over work safety and could distribute the risk and cost of injury as an expense of his own business.

Thus the *Doyle* court, in its analysis of the harvesters' employment status, considered that if the grower were not the employer, the harvesters themselves and the public at large would have to assume the entire financial burden when injuries occur. Accordingly, the harvesters were in the class of workers for which the protections of workers' compensation law were intended.

Robbins, by contrast, was in a distinctly different position from the harvesters in *Doyle*—he was free to take or reject the jobs that Parker offered. He negotiated payment with Parker and was not in a weak bargaining position. These facts support the conclusion that Robbins does not fall under the protections of the workers' compensation act but is an independent contractor.

Conclusion

Here, no amount of liberal construction can change the balance of evidence. Robbins was an independent contractor. This conclusion does not defeat the policy behind the workers' compensation system. The decision of the Board is affirmed.

Harris v. Workers' Compensation Appeals Board

Franklin Court of Appeal (2003)

This is an appeal from the Workers' Compensation Appeals Board. The Board held, and the trial court affirmed, that a golf caddie was an independent contractor rather than an employee and was not entitled to workers' compensation for injuries sustained on the job. We reverse.

Appellant Jordan Harris claimed that he sustained various orthopedic injuries in October 2001, while employed by Lamar Country Club as a golf caddie. The Club argued that Harris was an independent contractor. At the hearing before the Board, Harris testified that he had had continuous employment with the Club since May 2000, working from 7:00 a.m. to 3:00 p.m. daily. He said he was required to wear special clothing: he was issued a cap and had to buy a Club shirt. The Club maintains a caddie assignment and locker room, and has adopted rules of conduct for caddies—including one requiring them to get permission to go to other areas of the Club. According to Harris, his duties were greeting Club members, giving advice about the course, retrieving balls, carrying and cleaning golf clubs, getting carts, and changing shoe spikes. Harris received his assignments from the Club, but members would instruct him while he accompanied them on the course, which is where he was injured. There were no written contracts or tax forms, and Harris had no other caddie business.

Kim Day, the Club's office manager, testified that Harris was not on the Club's payroll, and was paid in cash through various members' accounts. She added that the Club provides caddies for its members, but that there is no set schedule and they are free to work elsewhere.

Andrew Schaefer, the Club's caddie master, testified that he considers the caddies' abilities and personalities when assigning them to members. Members can request certain caddies, but assignments can be refused and caddies may work elsewhere without repercussion. According to Schaefer, once on the course, the members supervise the caddies, although the caddies sometimes advise and serve as guides on the course. Among other things, caddies search for and clean balls and remove flags on the greens. Schaefer also testified that caddies have no set days or hours: they normally sign in and inform him when they are leaving. It is Schaefer's job to pay the caddies cash and charge the members' accounts.

On appeal, Harris notes that employment is presumed under the law when services are provided, and he argues that the Club failed to meet its burden of proving independent contractor status under the Franklin Labor Code § 705(a). Harris also contends that when the matter is analyzed under *Doyle v. Workers' Compensation Appeals Board* (Fr. Sup. Ct. 1991), the conclusion is inescapable that he was an employee.

Both sides agree that the Club and the caddie master have absolute authority over the premises, while the members direct the caddies on the golf course. But this does not mean that the Club's control does not extend to caddying. It is undisputed that the Club supervised Harris's dress, his behavior, and the types of services he rendered, and it administered the payment process.

A person who engages an independent contractor to perform a job for him or her may retain broad general power of supervision and control as to the results of the work so as to ensure satisfactory performance of the contract—including the right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work—without changing the nature of the independent contractor relationship or the duties arising from that relationship.

Under Franklin Labor Code § 253, employer/employee status exists when the employer controls the manner and means of the work and not just the results. We believe that is the case here. The Club primarily determines assignments based on caddies' abilities and personalities, and keeps track of attendance if not hours. The ability to reject assignments seems of small import considering the effect on income and the Club's clearly superior bargaining position.

The *Doyle* factors also support the conclusion that Harris was an employee. Since Day testified that the Club provides caddies for its members, it is apparent that caddying is an integral part of the Club's business. Thus, Harris provided services which also benefited the Club, and employment is presumed in such situations. Franklin Labor Code § 257. In addition, Harris did not have his own business, and the fact that the Club allows caddies to work elsewhere does not negate a finding of employment. Although some items of equipment such as golf clubs are supplied by the members, the Club provides a caddie room and lockers.

Considering the totality of circumstances, and § 280 of the Labor Code, which provides that the statute be liberally construed with the purpose of extending benefits to those injured in the course of employment, we conclude that Harris was an employee. The decision of the Workers' Compensation Appeals Board denying workers' compensation benefits is vacated, and the case is remanded for further proceedings consistent with this opinion.

February 2016 MPT: *In re Anderson*

Point Sheet

This February 2016 MPT Point Sheet was provided to bar examiners to assist in grading the examination. It addresses the factual and legal points encompassed within the MPT. While it is illustrative of the discussions that might have appeared in excellent responses constructed by examinees, it is more detailed than examinee responses were expected to be.

In re Anderson

DRAFTERS' POINT SHEET

In this performance test, the client, Nicole Anderson, is seeking legal advice in response to a workers' compensation claim filed against her by Rick Greer, a handyman retained by Anderson to perform general maintenance and repair work for Anderson's residential rental properties. Greer was injured while painting the exterior of one of Anderson's rental houses.

Under the Franklin Workers' Compensation Act, employers are required to maintain insurance coverage for employees who may sustain injuries arising out of and in the course of their employment. Workers' compensation does not apply to independent contractors.

Anderson did not maintain workers' compensation insurance coverage because she did not believe she was required to insure Greer against injury. If Greer is found to be Anderson's employee, she could face substantial personal liability as well as penalties under the Workers' Compensation Act for failing to provide this coverage. It is undisputed that Greer was injured while performing handyman services at one of Anderson's rental houses. Thus, the critical issue is whether Greer was Anderson's employee or an independent contractor at the time that he was injured.

Examinees' task is to draft an objective memorandum analyzing whether Greer would likely be considered an employee of Anderson or an independent contractor under the applicable statutory provisions and case law. The File contains the instructional memo from the supervising attorney, a transcript of a client interview, an email exchange between Anderson and Greer, and a copy of the workers' compensation claim submitted by Greer to Anderson for processing. The Library contains excerpts from the Franklin Labor Code and two cases.

The following discussion covers all the points the drafters intended to raise in the problem.

I. OVERVIEW

The task is to write an objective memorandum analyzing whether Greer is an employee of Anderson or an independent contractor. No specific formatting guidelines are provided, except that examinees are instructed not to prepare a separate statement of facts but to be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect their analyses.

II. THE STATUTES AND CASES

The following points, which examinees should extract and use in formulating their analyses, emerge from the Franklin Labor Code provisions and the cases in the Library:

- The Franklin Workers' Compensation Act ("the Act"), codified in the Franklin Labor Code, extends only to injuries suffered by an "employee" which arise in the course of his employment. *Robbins v. Workers' Compensation Appeals Board* (Franklin Ct. App. 2007).
- The Franklin Labor Code defines the terms "employee" (§ 251) and "independent contractor" (§ 253) and includes a presumption that a person rendering service for

another is an employee (§ 257). Employees include most persons "in the service of an employer under any . . . contract of hire" (§ 251), but do not include independent contractors (§ 257).

- The Labor Code further mandates that the provisions of the Act "be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Franklin Labor Code § 280.
- Finally, the Act places the burden of proof on the alleged employer to establish that a person injured while performing services for the employer was an independent contractor, rather than an employee. *Id*. § 705.
- The Labor Code definitions, presumptions, and burden of proof provide the statutory framework for analyzing workers' compensation claims, but they do not, standing alone, answer the question whether particular persons in particular situations are employees or independent contractors. Rather, such determinations are fact-specific and involve an analysis of several factors.
- The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. *Robbins*.
- The existence of such right of control, and not the extent of its exercise, gives rise to the employer-employee relationship. However, this factor is not exclusive. *Id.*
- Determining whether an individual is an employee or an independent contractor also requires an analysis of eight additional, secondary factors, derived largely from the Restatement (Second) of Agency and from other jurisdictions. These are known as the *Doyle* factors because they were first enunciated collectively in *Doyle v. Workers' Compensation Appeals Board* (Franklin Sup. Ct. 1991).
- The *Doyle* factors (cited in *Robbins*) are as follows: (1) whether the worker is engaged in a distinct occupation or an independently established business; (2) whether the worker or the principal supplies the tools or instrumentalities used in the work, other than tools and instrumentalities customarily supplied by employees; (3) the method of payment, whether by time or by the job; (4) whether the work is part of the regular business of the principal; (5) whether the worker has a substantial investment in the worker's business other than personal services; (6) whether the worker hires employees to assist him; (7) whether the parties believe they are creating the relationship of employer-employee; and (8) the degree of permanence of the working relationship.

III. ANALYSIS

A. The Right-of-Control Test

Examinees should recognize that where an injured worker claims to be an employee and the employer claims that the worker is an independent contractor, the employer has the burden of proof in establishing the worker's independent contractor status. Franklin Labor Code § 705.

- The distinguishing characteristic of an employer is the power to control the details of the work and methods of performance. *Robbins.*

- In *Robbins*, a case involving a gardener hired by a diner to prune bushes, the court concluded that the gardener was hired to "produce *the result* of trimming the bushes," and the court found no evidence to suggest that anyone instructed the gardener on how to do his work. The court contrasted the lack of supervision over the gardener against the "pervasive control" exercised by the defendant grower in the *Doyle* case, where the employees served as unskilled laborers and "all meaningful aspects" of the business (including price, crop cultivation, etc.) were controlled by the grower.
- Here, Anderson was involved in picking out paint and fixtures such as ceiling fans, and in ensuring the overall *results* of the project. In her own words, she was "pretty particular" about making sure the job was "done right," especially in situations involving an expensive rental property such as the Clover Circle rental house. (*See* client interview.)
- However, she typically did not get involved in supervising *how* Greer did the projects (i.e., the "means" by which the results were accomplished). In her own words, she did not "micromanage" Greer's work. To the contrary, because she holds a full-time job, she often showed up *after* Greer had completed a project just to make sure it was finished and done correctly—again evidencing control over the result, not the means. For instance, when a toilet was leaking, Greer was the one who diagnosed and fixed the leak, and then she would check to make sure the leak had been fixed.
- Anderson also required Greer to inspect the exteriors of each of her properties monthly, using a checklist that she provided to him.
- With regard to the painting project at issue, Anderson acknowledges in her interview that she exercised some degree of control over the means of the project by instructing Greer to mask the windows, use a narrow brush to paint the trim, and apply three coats of paint.
- However, a person who engages an independent contractor retains "broad general power of supervision and control as to the results of the work so as to ensure satisfactory performance," including the "right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work." *Harris v. Workers' Compensation Appeals Board* (Franklin Ct. App. 2003).
- That Anderson exercised this right in connection with the Clover Circle project does not transform the independent contractor nature of the parties' relationship into one of employer-employee. Nor do the monthly inspections alter the nature of the parties' relationship, as the inspections were necessary in order to identify repairs that needed to be made and thereby ensure satisfactory performance of the work performed by Greer.
- The facts indicate that with few exceptions, Anderson relied on Greer's expertise as a handyman and controlled only the result of his work (e.g., paint color or the particular type of ceiling fan installed), not the means by which the result was achieved (e.g., the techniques used by Greer in painting a room or installing a fan).
- This contrasts with the circumstances in *Harris*, wherein the court concluded that the employer country club controlled the manner and means and not just the result, because

the club supervised golf caddies' dress, behavior, types of services rendered, and even the payment process, notwithstanding that members paid for the caddies' services.

- Moreover, the client interview transcript and email exchange between Anderson and Greer indicate that Greer set his own hours, as did the gardener in *Robbins*. Anderson indicated that she would call Greer as needed and he would schedule the work and complete it at his convenience. Although Anderson paid Greer a retainer of $250 per month and she stated in her client interview that the purpose of the retainer was to ensure that Greer "is always available" to work on her projects, there is no indication that she required him to work a certain number of hours or work on certain days or at particular times. Rather, as projects came up, Anderson would call Greer and he would "work[] [her] into his schedule and get[] the project done."
- Thus, like the gardener in *Robbins*, Greer worked in a largely unsupervised, highly skilled capacity on his own schedule, subject only to practical limitations such as a tenant's availability or the presence of an unsecured dog.

B. The *Doyle* Factors

Factor #1: Whether the worker is engaged in a distinct occupation or an independently established business

- The client interview transcript and the emails indicate that Greer has his own business called "Greer's Fix-Its" and even advertises in online classified ads. It is not stated how long Greer has been in business, but the File indicates that he has multiple clients (including the references whom Anderson contacted as well as Anderson's friend Jim, who owns an eight-unit apartment complex).
- Thus, Greer is more like the gardener in *Robbins* (who also had multiple clients and his own separate business) than the golf caddie in *Harris* (who did not have a separate business and who worked exclusively for the alleged employer).

Factor #2: Whether the worker or the principal supplies the tools or instrumentalities used in the work, other than tools and instrumentalities customarily supplied by employees

- In *Robbins*, the gardener supplied his own equipment for his work, including tools that a restaurant would not "commonly" have. Conversely, in *Harris*, there were very few tools involved (caddie assignment/locker room, golf carts, and golf clubs), all of which were provided either by the country club or by club members.
- Here, Greer supplied his own tools, including a big toolbox in the back of his pickup truck and the ladder that he fell from. Better examinees may note that the tools supplied and used by Greer are tools that a rental property owner such as Anderson might have (which distinguishes this situation somewhat from the restaurant owner in *Robbins*), but that nonetheless the tools were in fact supplied by Greer.

- Although Anderson sometimes picked out the paint, and fixtures such as ceiling fans and faucets for particular projects, astute examinees should note that paint, ceiling fans and the like are not tools. Rather, they are materials, the cost of which Anderson was already responsible for paying. So whether she paid for these materials up front or reimbursed Greer after the fact should have no bearing on the analysis of this *Doyle* factor.

Factor #3: The method of payment, whether by time or by the job

- This factor is a closer call than Factor #2. Greer worked for Anderson on a steady basis that averaged out to about 10 hours a month (as contrasted against the two-project engagement in *Robbins*) and was paid a $250-per-month retainer. However, the File also indicates that the work fluctuated and that Greer was paid on a job-by-job basis for hourly work exceeding 10 hours a month, that he was paid a flat fee (instead of an hourly rate) for certain projects such as painting interior rooms, and that the parties negotiated the fee for more complicated projects.
- In addition, there is no indication of any obligation on Anderson's part to continue paying Greer a retainer or on Greer's part to keep Anderson as a client, and Anderson did not deduct income taxes from the money that she paid Greer.
- Thus, on balance, this factor also weighs in favor of Greer as an independent contractor.

Factor #4: Whether the work is part of the regular business of the principal

- In *Doyle* and *Harris*, the work performed by the employee was part and parcel of the employer's business—growers need laborers to harvest their crops and high-end golf courses provide caddie service to their members, respectively. Conversely, in *Robbins*, pruning bushes was found to be "wholly unrelated" to the business of food service.
- In *Doyle*, the court concluded that harvesting formed "a regular and integrated portion" of Doyle's business operation, in that Doyle's "entire business" was the production and sale of agricultural crops. Here, it cannot be said that Anderson's "entire business" is the maintenance and repair of rental properties. Rather, she is in the business of providing living spaces for people, and maintaining and repairing those spaces takes on average less than one hour per rental house per month.
- Although it could be argued that repair and maintenance of rental property is not "wholly unrelated" to the business of renting property—in that Anderson needed to ensure that her rental properties were maintained in good condition—at the same time it cannot be said that the work performed by Greer was at the "heart" of Anderson's business, as was the case with the harvesters in *Doyle*.
- Ultimately, this factor involves thoughtful analysis and is a closer call than some of the other factors, but better examinees should conclude that the maintenance work provided by Greer—which averaged out to less than one hour per rental house per month (10 hours total divided by 11 rental properties)—was not so central to the business of providing

residential rental properties as to transform Greer into Anderson's employee, especially when considered in conjunction with the other *Doyle* factors.

Factor #5: Whether the worker has a substantial investment in the worker's business other than personal services

- The gardener in *Robbins* had 25 years invested in his gardening business and owned his own equipment. Although we do not know how long Greer's Fix-Its has been operating, we do know that Greer has a built-in toolbox on the bed of his pickup truck containing a multitude of tools and that he advertises his services online.
- Thus, unlike the golf caddie in *Harris* (who invested in nothing more than the country club shirt required to be worn by the club's caddies), here the facts strongly suggest that Greer has a "substantial investment" in his business.

Factor #6: Whether the worker hires employees to assist him

- None of the workers in the cases hired assistants. Neither did Greer. But as noted in *Robbins*, the process of distinguishing employees from independent contractors is fact-specific and qualitative, not quantitative, and it does not depend on the presence or absence of any one *Doyle* factor viewed in isolation. In addition, the reality is that many independent contractors, such as the gardener in *Robbins*, are able to perform all particulars of a job without needing to hire employees. Thus this factor is probably not as important as the others in determining an individual's employment status.

Factor #7: Whether the parties believe they are creating the relationship of employer-employee

- Based on the claim filed by Greer and Anderson's response upon receiving the claim, it appears that Greer may have viewed himself as an employee (or at least he is asserting this in order to be eligible for workers' compensation benefits), whereas Anderson clearly did not view him as such. Examinees may note that the filing of a workers' compensation claim should not have any bearing on whether the parties believe they have created an employer-employee relationship, as it was not considered by the *Robbins* court.
- Ultimately, not enough facts are known to fully analyze this factor. However, based on the facts in the File, the nature of the relationship between Anderson and Greer is more akin to the relationship between the parties in *Robbins* than in *Harris*.
- In *Harris*, the employee had little or no bargaining power, and the court concluded that the country club enjoyed a "clearly superior bargaining position" over its caddies.
- Here, in contrast, both the client interview and the emails suggest that the parties had equal bargaining status. Greer set his hourly rate, and the parties negotiated payment on any projects involving a flat fee, such as painting nonstandard interior rooms. Also, because Greer had other clients, he was necessarily in a better bargaining position than the employee in *Harris*, who depended exclusively on the country club for income.

Factor #8: The degree of permanence of the working relationship

- In *Robbins*, no date was specified for the gardener's return after the first time he pruned bushes for the diner. Here, as discussed above, although Anderson paid Greer a monthly retainer, there was no obligation on Anderson's part to continue paying Greer a retainer or on Greer's part to continue working on Anderson's rental properties. Greer did not report to work for Anderson but instead provided services only on an as-needed basis. Either party had the right to terminate the arrangement at any time, and thus their arrangement lacked the "permanence" of a traditional employer-employee relationship.

C. Statutory/Policy Analysis

- Franklin Labor Code § 280 mandates that the provisions of the Act "be liberally construed" for purposes of protecting persons injured in the course of their employment.
- The *Robbins* court noted that it must consider the remedial purpose of workers' compensation laws, the class of persons intended to be protected, and the relative bargaining positions of the parties. Excluding independent contractors from the class of persons protected does not contravene the spirit of the law in that independent contractors have control over how their work is done, have primary power over safety, and can distribute the risk and cost of injury as an expense of their business.
- Like the gardener in *Robbins*, Greer had the ability to spread the cost of insurance against work-related injuries through the fees he charged his various customers for his services. Greer also did the work mainly on his own terms using his own equipment. While Anderson did check his work, and sometimes picked a particular fixture or paint color, Greer did the work unsupervised by her.
- Finally, Greer and Anderson *negotiated* his rates—he was paid either by the hour or by the job. He was on an equal footing with Anderson, and was free to work for others or take or leave assignments from her, unlike the unskilled workers in *Doyle* or the caddie in *Harris*.
- Thus, Greer was not like the harvesters in *Doyle*, who needed the protection of the Act, or the caddie in *Harris*, whose work performance was under the strict supervision of the country club.

IV. CONCLUSION

Examinees should conclude that Greer will most likely be considered an independent contractor rather than Anderson's employee. Although some of the *Doyle* factors are closer calls than others, on balance most weigh in favor of a finding that Greer is more like the gardener in *Robbins* than the employees in *Doyle* and *Harris*. Thus, Greer would likely *not* be considered an employee of Anderson, and his claim for workers' compensation benefits should be denied.

February 2016 MPT: *Miller v. Trapp*

File

Stuart, Parks & Howard LLC
Attorneys at Law
1500 Clark Street
Franklin City, Franklin 33007

MEMORANDUM

To: Examinee
From: Timothy Howard, Partner
Date: February 23, 2016
Re: Katie Miller

We have been retained by Katie Miller to pursue civil assault and battery claims against Steve Trapp, guitarist and lead vocalist for the band the Revengers, for an incident that occurred at a concert two weeks ago. I have met with Miller and reviewed the evidence. Our firm has agreed to take the case because Miller has meritorious claims for assault and battery, and because her uncle is a valued client of the firm.

Yesterday, I called Trapp's lawyer, Saul Leffler, and told him that we are preparing to sue Trapp for his assault and battery of Miller. I asked Leffler if his client would be interested in resolving the matter short of litigation. Leffler was dismissive and said that Miller does not have a case. I have attached a memo summarizing our phone conversation.

Please draft both of the following:

(1) A demand letter addressed to Attorney Leffler, written for my signature

Your letter should persuasively state the basis for Miller's assault and battery claims against Trapp and argue that Miller will be able to recover compensatory and punitive damages. Follow our firm's guidelines on drafting demand letters (attached). Leave blank the specific amounts that we will request for each category of damages. I will fill in the amounts later.

(2) A brief memo to me

Your memo should set forth your recommendation of the specific amounts along with the rationale for these amounts for each category of damages that we could reasonably expect to recover at trial. Use the attached cases and summaries of recent Franklin civil jury verdicts as guidance on what a jury might award for Miller's damages. Refer to these jury verdicts in your memo to me, but do not cite them in the demand letter. I will fill in the amounts in the demand letter after I have reviewed your memo.

Stuart, Parks & Howard LLC

OFFICE MEMORANDUM

To: All Attorneys
From: Managing Partner
Date: September 5, 2013
Re: Guidelines for Drafting Demand Letters

A demand letter states our client's legal claims and demands that the opposing party pay damages and/or take or cease taking a certain action. A demand letter is designed to advocate a position and to persuade the recipient.

A demand letter typically includes (1) a brief statement indicating that we represent our client in this matter; (2) a brief statement of the purpose of the letter; (3) a succinct but persuasive statement of facts; (4) a thorough analysis of the bases for our client's claims; (5) a blank space for a specific settlement demand or amount, to be filled in by the supervising partner; (6) a deadline by which the opposing party must comply (usually one or two weeks); and (7) the consequences for failing to comply by the deadline, including the risks of litigation for the opposing party.

When discussing the bases for our client's claims, you should thoroughly analyze and integrate both the facts and the applicable law and respond to arguments that have been made against the claims.

A well-written demand letter can promote a favorable settlement. It should set forth the strongest credible arguments on behalf of our client so that there is room for negotiation.

RockNation, a blog by Katie Miller

Commentary on Rock and Roll

February 3, 2016

Rock fans, I have some exciting news. Through my gig reporting for my college newspaper, I got a press pass for the Revengers concert next week at the Franklin City Arena. I am going to find Revengers guitarist and lead vocalist Steve Trapp backstage after the show and interview him. I promise I will provide the details of that interview here. Wish me luck!! I'm really psyched to talk to Steve Trapp. He's super hot and famous.

RockNation, a blog by Katie Miller

Commentary on Rock and Roll

February 16, 2016

Readers, I am very disappointed to tell you that I can't provide an account of an interview with Steve Trapp of the Revengers as promised. I had planned to interview him after the Revengers concert at the Franklin City Arena last week. Instead of giving me an interview, Steve gave me a dislocated shoulder!

After the concert, I was eagerly waiting offstage to speak to Steve. It was a long wait, rock fans, because the Revengers played two encores, which were awesome. After the final song, the band walked offstage. I was hoping to stop Steve for a quick impromptu interview. I had my smartphone out, set to record. A bunch of other photographers and journalists were waiting too. I was about half of the way back in the group. Nina Pender, a photographer from *Celebrity* magazine, was in the very front. When Steve walked offstage, Nina moved in to take a picture of him. Steve punched her in the nose, wrested the camera out of her hands, and smashed it on the ground. I stood there frozen, mouth agape. Steve continued toward us. He looked at me and yelled, "Get out of my way, you little punk, or I'll beat the hell out of you." He raised his arm as if to hit me. I was freaking out. Instead of hitting me, he grabbed my phone out of my hand and smashed it on the ground. I was holding the phone tightly because of the crowd. When he grabbed my phone, he pulled so hard that he dislocated my shoulder, and I had to go to the hospital.

I have been a wreck since this happened. The pain was unbelievable for almost four hours until the doctor popped my shoulder back in place. I have $5,000 in medical bills; I had my arm in a sling for three days; I missed a week of my part-time work in the school cafeteria, which cost me $100; and I had to pay $500 to replace my phone.

This is all devastating. Steve has been my idol since he started playing with the Revengers. I have everything the Revengers ever recorded, and I have followed every piece of news about Steve’s music and personal life. I think Steve should have to pay for what he did, don’t you? My blog will no longer celebrate the Revengers as the best rock-and-roll band. I now rate Palindrome as the top living rock-and-roll band!

Reeling Rock **February 13, 2016**
The Online Magazine about Rock and Roll
Steve Trapp Allegedly Punches Photographer in Post-concert Melee

FRANKLIN CITY — Musician Steve Trapp, lead vocalist and guitarist for the Revengers, was involved in an alleged assault on a photographer last Tuesday, February 9, as he left the stage after a Revengers concert. The Franklin City Police Department is conducting a criminal investigation into the incident, which occurred at approximately 11:00 p.m.

Trapp became upset at *Celebrity* magazine photographer Nina Pender as she was trying to take his photograph. Trapp asked Pender to stop shooting. He then walked over to Pender, punched her in the face, and slammed her camera on the ground. Other photographers at the scene captured the incident. Paramedics were called, and Pender was taken to a hospital where she was treated for serious injuries.

The day after the incident, Trapp left Franklin City to stay at his 15-bedroom vacation home in Xanadu, the exclusive Franklin beach resort. Trapp could not be reached for comment.

Pender has filed a criminal complaint against the musician, and Franklin City Police Department Detective Kevin Park said that an investigation is ongoing. He said that the case will be presented to the District Attorney's office as early as today. "With the photographs and videos, it's pretty solid evidence," reported Park.

Pender's lawyer, Russ Smalls, told *Reeling Rock* that Pender intends to file a civil lawsuit against Trapp seeking $5 million in damages.

Others were injured during the incident. After Trapp assaulted Pender, the musician stormed through the crowd of dozens of paparazzi and journalists. Witnesses report that Trapp yelled obscenities and pushed individuals out of his way. One newspaper reporter was taken to the hospital with a shoulder injury.

Trapp has had previous run-ins with the law. In 2009, he was charged with possession of illegal drugs, but the charges were later dropped. In 2012, Trapp pleaded guilty to misdemeanor assault and battery after attacking his then bodyguard, Alex Peel.

The Revengers' latest album, *Jab*, has received universal acclaim. *Reeling Rock* awarded *Jab* four out of five stars. *Jab* was also named 2015 Album of the Year at the Franklin City Music Awards.

[Photographs of Trapp punching Pender and a link to amateur YouTube video of the encounter, both of which were included with the article, are omitted.]

Stuart, Parks & Howard LLC

MEMORANDUM TO FILE

From: Timothy Howard
Date: February 22, 2016
Re: Katie Miller matter; phone conversation with Saul Leffler

Today I spoke with Saul Leffler, Steve Trapp's lawyer. We discussed Katie Miller's claims for assault and battery against Trapp. Leffler was dismissive and said that we would be "crazy" to pursue them.

Leffler denied that Trapp had committed a battery. According to Leffler, Trapp had just finished performing a two-and-a-half-hour high-energy rock concert, and he was exhausted from the performance and eager to get to his dressing room. According to Leffler, Trapp does not recall even touching Katie Miller as he passed the crowd of journalists. Leffler also claimed that even if Trapp had made any contact with Miller, it would have been accidental. Assuming that there was some contact, Leffler said that Miller had consented to a certain amount of jostling by attending the concert and going backstage. Leffler said that Trapp did not intend to harm her, and therefore did not have the requisite intent for battery.

Leffler also said that Miller lacks a meritorious claim for assault. In response to my statement that Trapp's conduct caused Miller to have an imminent apprehension of a battery, he said, "Baloney." Leffler conceded that Trapp was annoyed that so many journalists were crowded in his path; however, Leffler stated that Trapp did nothing that would cause Miller to fear that he would harm her. Leffler denied that Trapp singled out Miller or attempted to frighten her in any way.

Leffler got very upset when I mentioned punitive damages, and he accused Miller of attempting to capitalize on Trapp's fame and fortune. Leffler insisted that a jury will never find that Trapp had any injurious intent toward Miller. He emphasized that Trapp is a famous, well-respected musician, who generously donates to a wide variety of charities, including shelters for homeless women. Leffler said that Trapp does not even know Miller, and he has no evil motives toward young women generally or Miller in particular. I responded that the last thing Trapp needed now was more bad publicity. Leffler had no comment.

Leffler concluded by saying that if our firm pursues Miller's claims, we will lose.

FRANKLIN JURY VERDICT SUMMARIES

$360,000—Cook v. Matthews Garage (March 2015)

Plaintiff went into defendant's automobile repair shop to complain about the way his wife, a customer, had been treated by one of defendant's employees. That employee then pushed plaintiff to the floor and screamed and cursed at him. Plaintiff's arm was broken. Defendant knew that the employee had been terminated from prior jobs because of his tendency to use violence to settle work-related disputes.

Medical expenses—$10,000
Pain and suffering—$50,000
Punitive damages—$300,000

$1,500,000—Alma v. Burgess (April 2015)

Defendant attacked plaintiff, a 35-year-old teacher, when plaintiff was leaving her house at night. Defendant stabbed plaintiff in the torso and upper leg. Plaintiff was taken by ambulance to the hospital, where she received treatment and remained for four days.

Medical expenses—$100,000
Pain and suffering—$400,000
Punitive damages—$1,000,000

$52,000—Little v. Franklin Chargers, Inc. (October 2015)

Plaintiff attended a professional basketball game as a spectator. During halftime, defendant's team mascot grabbed plaintiff hard and attempted to pull him onto the floor to participate in an entertainment routine. The mascot pulled plaintiff's arm with such force that plaintiff fell down, dislocating his left shoulder. Plaintiff felt that he had been humiliated in front of his fiancée and a stadium full of onlookers.

Medical expenses—$12,000
Pain and suffering—$40,000
Punitive damages of $200,000 requested but denied.

February 2016 MPT: *Miller v. Trapp*

Library

Horton v. Suzuki

Franklin Court of Appeal (2009)

This is an appeal from a judgment for the plaintiff following a bench trial of a civil battery case. The defendant argues that 1) the lower court's finding of lack of consent was clearly erroneous; 2) the lower court's finding on intent was clearly erroneous; and 3) even if there was a battery, the damages award was excessive.

Plaintiff John Horton sued defendant Rikuo Suzuki, his karate instructor, for injuries suffered as a result of an alleged battery committed by Suzuki.

It is undisputed that Horton was a student in a karate class conducted by Suzuki. Horton testified that he knew he would be subjected to rough physical contact by classmates and the instructor as a necessary part of the class. A classmate testified that Horton was speaking in the locker room to another student after class when Suzuki apparently misunderstood what Horton said and struck Horton on the cheek. The classmate further testified that Suzuki appeared angry and yelled at Horton.

Suzuki argues that Horton consented to the contact by enrolling in the karate class. Several witnesses for Suzuki testified that a student of karate must expect rough treatment from his instructor and that the instructor often physically disciplines the students during class. Suzuki testified that he was attempting to discipline Horton when he struck him. However, there is no evidence that the blow had any connection with the karate instruction, and the evidence indicates that Suzuki struck Horton for some personal reason.

An actor is subject to liability to another for the tort of battery if he or she acts intending to cause a harmful or offensive contact, or an imminent apprehension of such a contact, and a harmful or offensive contact results. To prevail on a civil battery claim, the plaintiff must show that he or she did not consent to (or give apparent consent to) the defendant's contact. Consent and apparent consent are relevant to whether there was in fact a harmful or offensive contact.

Here Horton may have consented to a certain amount of harmful or offensive contact during his karate instruction. Nothing in the record, however, indicates that Horton consented to being struck on the cheek by his instructor after class had been dismissed.

Suzuki also argues that he is not liable for battery because he did not intend to harm or offend Horton. In Franklin, for a plaintiff to prevail on a battery claim, it is sufficient that the defendant intended to cause a contact that turned out to be harmful or offensive. The defendant does not have to have intended that the contact result in harm or offense.

Thus, it is irrelevant whether Suzuki intended that Horton be harmed or offended. Suzuki intended to strike Horton on the cheek, and in doing so engaged in intentional harmful and offensive contact.

Finally, Suzuki argues that even if there was a battery, the trial court erred by awarding Horton excessive damages of $7,500. For intentional torts like assault or battery, a plaintiff may seek two kinds of damages: compensatory and punitive. Compensatory damages may include medical expenses, lost wages, and pain and suffering. Pain and suffering includes physical pain as well as mental suffering such as insult and indignity, hurt feelings, and fright caused by the battery. Moreover, mental suffering may be inferred from proof of fright caused by a sudden, unprovoked, and unjustifiable battery. There is no mathematical formula for assessing the value of pain and suffering; that determination is left to the sound discretion of the trier of fact.

Horton suffered a cut on the inside of his mouth which became infected, and for which he incurred only $1,500 in medical expenses. The court properly found that Suzuki committed battery and awarded Horton $7,500 in compensatory damages: $1,500 for medical expenses and $6,000 for pain and suffering.

Although punitive damages are also available in civil assault and battery cases, the trial court denied Horton's request for punitive damages and that denial was not appealed.

We find the total award of $7,500 to be adequate and in conformity with awards in battery cases in which the injuries incurred were minimal.

Our review of the record persuades us that there is sufficient evidence to support the lower court's findings. We therefore conclude that the lower court's findings were not clearly erroneous.

Affirmed.

Polk v. Eugene

Franklin Supreme Court (2004)

This is a suit for compensatory and punitive damages growing out of an alleged battery. The plaintiff, Barrington Polk, is a physician. The defendant, John Eugene, is a member of the private Hills Club. After a jury trial, the court rendered judgment for the plaintiff, including an award of punitive damages. The Franklin Court of Appeal reversed. The questions before this Court are whether a battery was committed and, if so, whether the trial court abused its discretion in entering judgment for $3,000 in punitive damages.

Polk had been invited to a one-day medical conference at the Hills Club. The invitation included a luncheon. The luncheon was buffet style, and Polk stood in line with others. As Polk was about to be served, Eugene approached him, snatched the plate from Polk's hand, and shouted that Polk could not be served in the club because of his race. Polk was not actually touched during the incident. Polk testified that he did not fear or apprehend physical injury but that he was highly embarrassed by Eugene's conduct in the presence of his associates.

The jury found that Eugene "forcibly dispossessed plaintiff of his dinner plate" and "shouted in a loud and offensive manner" that Polk could not be served there, thus subjecting Polk to humiliation and indignity. The jury found that Eugene acted maliciously and awarded Polk $1,000 in compensatory damages for pain and suffering due to his humiliation and indignity and $3,000 in punitive damages. Eugene appealed, arguing that there was no battery but even if there was a battery, the evidence did not support an award of punitive damages.

The court of appeal held that there was no battery because there was no physical contact and therefore did not reach the issue of punitive damages. However, it has long been settled that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body.

Under the facts of this case, we have no difficulty in holding that the intentional grabbing of Polk's plate constituted a battery. We held that the snatching of an object from one's hand constituted a battery in *Riley v. Adams* (Franklin Sup. Ct. 1960). In *Riley*, the plaintiff bought some articles of intimate apparel from a store at which the defendant was the manager. The defendant claimed that he suspected that the plaintiff had not paid for all the articles in her shopping bag. Rather than confronting the young woman at the cash register or in the store, the defendant waited until she had walked several blocks and crossed the square to confront her. He ran up and took the plaintiff's bag from her by force. He proceeded to search it and take the articles out and hold them up to the public view. The court held that the defendant's acts constituted a battery, explaining that "to constitute a battery, it is not necessary to touch the plaintiff's body or even his clothing. Knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when done in an offensive manner, is sufficient to constitute an offensive touching." *Riley*.

Since the essence of the plaintiff's grievance consists in the offense to his dignity involved in the unpermitted and intentional invasion of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contact with anything so connected with the body as to be customarily regarded as part of another's person is actionable as an offensive contact with his person. We hold, therefore, that the forceful dispossession of Polk's plate in an offensive manner was sufficient to constitute a battery.

Damages for mental suffering are recoverable without a showing of actual physical injury in a civil action for battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff's person and not the actual harm done to the plaintiff's body. Personal indignity is the essence of an action for battery; consequently, the defendant is liable not only for contacts that do actual physical harm but also for those that are offensive. We hold, therefore, that Polk was entitled to compensatory damages for mental suffering due to the battery, even in the absence of any physical injury.

We now turn to the question of punitive damages. The jury verdict concluded with a finding that $3,000 would "reasonably compensate plaintiff for Eugene's evil act and reckless disregard of plaintiff's feelings and rights."

It has long been established in Franklin that punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. This common law rule makes sense in terms of the purposes of punitive damages. Punitive damages are awarded in the jury's discretion to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future. The focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. In assessing punitive damages, the trier of fact can properly consider (a) the character of the defendant's act, namely whether it is of the sort that calls for deterrence and punishment; (b) the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause; and (c) the wealth of the defendant.

Punitive damages are never awarded as a matter of right, no matter how egregious the defendant's conduct. Compensatory damages, by contrast, are mandatory. Once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.

Eugene argues that the award of punitive damages is not supported by substantial evidence. However, the standard of review for an award of punitive damages is whether the trial court abused its discretion. The amount of punitive damages is left to the discretion of the trier of fact, based on the circumstances of each case, but should not be so unrelated to the injury and compensatory damages proven as to plainly manifest passion and prejudice rather than reason and justice. The United States Supreme Court has instructed that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. *State Farm v. Campbell*, 538 U.S. 408 (2003).

An appellate court should disturb a determination of punitive damages only in extreme cases. Here, the jury awarded $1,000 in compensatory damages and $3,000 in punitive damages. The punitive damages awarded were only three times the amount of compensatory damages and within the *State Farm v. Campbell* guideline.

The jury found that Eugene acted with an evil motive and a reckless disregard of Polk's rights and feelings. The record contains sufficient evidence to support this finding.

The court of appeal's holding that there was no battery is reversed, and the judgment of the trial court is reinstated in favor of the plaintiff.

Brown v. Orr

Franklin Court of Appeal (2000)

The plaintiff, Lydia Brown, appeals from a summary judgment for the defendant, Richard Orr, in which the trial court found that his actions did not constitute assault. For the reasons set forth below, we reverse.

Brown and Orr were both employed at Hotel Livingston in Franklin City and were members of the same labor union. During a conversation concerning the proper method of filing a grievance against the hotel with the union, Orr allegedly shook his finger in Brown's face. Brown told Orr that the last man who pointed his finger at her "was sorry that he did it." Orr then allegedly stated that he would "take [her] down anytime, anywhere." The conversation then ended, and Brown returned to work. The next day she and Orr had a second confrontation, during which Orr allegedly repeated his earlier threat. Following that second incident, Brown became "agitated and upset" and reported Orr's threats to her supervisor. Brown commenced this civil suit against Orr for assault. Orr moved for summary judgment, claiming that his conduct did not create a reasonable apprehension of physical harm in Brown. The trial court granted Orr's motion. Brown appeals. We reverse.

An actor is subject to liability for assault if he acts intending to cause a battery or imminent apprehension of a battery and the plaintiff is put in well-founded apprehension of an imminent battery. The trial court found that Orr's conduct could not have put Brown in apprehension of an imminent battery.

On appeal, Brown cites *Holmes v. Nash* (Fr. Sup. Ct. 1990) in arguing that Orr's threats, when combined with the fact that he shook his finger in her face during their first conversation, created a question for the jury on the issue of assault. She contends that Orr's actions were similar to those of the defendant in *Holmes.*

In *Holmes*, defendant Tom Nash repeatedly threatened to kill plaintiff Jenny Holmes if she sued him. When Holmes filed a legal action, Nash came to her home, beat on the door, and attempted to pry it open, while repeating his threats to kill her. There was also evidence that Nash made harassing telephone calls to Holmes. Those acts so unnerved Holmes that she changed the locks on her door, nailed her windows closed, and had friends spend the night at her home. In *Holmes*, the court held, "Words standing alone cannot constitute an assault. However, they may give meaning to an act, and when taken together, they may create a well-founded fear of a battery in the mind of the person at whom they are directed, thereby constituting an assault." The court concluded that it could not say that Nash's actions were sufficient to give rise to a well-founded apprehension of an imminent harmful or offensive contact but that it was a question for the jury.

Although the facts in this case are not as strong as those in *Holmes*, we cannot say that, as a matter of law, Orr's acts and threats could not create a reasonable or well-founded apprehension of imminent physical harm. There was evidence that after Orr's first alleged threat, Brown walked away. That evidence is not conclusive, however, as to whether she discounted the threat or whether she left to avoid the threatened harm. Brown also testified that after the second alleged assault the next day, she had to leave work because she was so frightened and upset.

Summary judgment is appropriate if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. After reviewing the evidence before the trial court in a light most favorable to the non-movant, as this court must do when reviewing a summary judgment, we conclude that Brown presented sufficient evidence that Orr's alleged threats created a well-founded fear of imminent harm and created a jury question on her claim of assault. Therefore, the summary judgment on Brown's assault claim is reversed.

Reversed and remanded.

February 2016 MPT: *Miller v. Trapp*

Point Sheet

This February 2016 MPT Point Sheet was provided to bar examiners to assist in grading the examination. It addresses the factual and legal points encompassed within the MPT. While it is illustrative of the discussions that might have appeared in excellent responses constructed by examinees, it is more detailed than examinee responses were expected to be.

Miller v. Trapp

DRAFTERS' POINT SHEET

In this performance test, the examinee is employed by the law firm of Stuart, Parks & Howard. Katie Miller has retained the firm to pursue claims for civil assault and battery against musician Steve Trapp in connection with an incident that occurred after a concert by Trapp's band, the Revengers. Examinees have two tasks to complete: (1) draft a demand letter on behalf of Miller in anticipation of a lawsuit for assault and battery against Trapp, and (2) draft a brief memo to the assigning partner setting forth an analysis and recommendation of the compensatory and punitive damages that Miller can reasonably and realistically expect to recover from Trapp at trial. Based on the analysis in the examinee's memo, the partner will determine the appropriate amounts of damages to seek in the demand letter.

The File contains an instructional memo from the assigning partner Timothy Howard, the law firm's guidelines for drafting demand letters, an excerpt from Katie Miller's blog RockNation, an article from *Reeling Rock* magazine about the incident, a file memorandum summarizing a phone conversation between Timothy Howard and Trapp's attorney Saul Leffler, and summaries of Franklin jury verdicts in civil cases. The Library contains three Franklin cases: *Horton v. Suzuki*, *Polk v. Eugene*, and *Brown v. Orr*.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

The assigning partner requests that the examinee (1) write a demand letter to Steve Trapp's attorney, Saul Leffler, on behalf of the client, Katie Miller, setting forth the basis for Miller's assault and battery claims and the basis for compensatory and punitive damages; and (2) write a brief memo to the assigning partner setting forth the examinee's analysis and recommendation of the amounts for each category of damages that Miller can reasonably and realistically expect to recover at trial.

A. Demand Letter

The examinee's first task is to write a demand letter to Saul Leffler. The demand letter should persuasively set forth the strength of Miller's assault and battery claims and her eligibility for compensatory and punitive damages. The guidelines for drafting demand letters indicate that demand letters should state the client's legal claim, demand that the other party pay damages and/or take or cease taking a certain action, and advocate a position and persuade the recipient.

The firm's guidelines state that a demand letter typically includes

(1) a brief statement indicating that the lawyer represents the client in the present matter;

(2) a brief statement of the purpose of the letter;

(3) a succinct but persuasive statement of facts;

(4) a thorough analysis of the bases for the client's claims;

(5) a blank space for a specific settlement demand or amount, to be filled in by the supervising partner;

(6) a deadline by which the other party must comply (usually one or two weeks); and

(7) the consequences for failing to comply by the deadline, including the risks of litigation for the opposing party.

Examinees must follow the guidelines and draft a demand letter to Saul Leffler that includes each of the seven listed components. In the discussion of the bases for the client's claims (item (4) above), the examinee should thoroughly analyze and integrate both the facts and the applicable law. The examinee should also respond to arguments made against the claim and set forth the strongest credible claim on behalf of the client so that there is room for negotiation. In line with the instructions from Timothy Howard, the examinee should not refer to the Franklin jury verdict summaries in the demand letter.

B. Memo Regarding Damages

The examinee's second task is to draft a brief memo to the assigning partner about Miller's damages arising from the assault and battery claim. Examinees are told to analyze and recommend the amounts for each category of damages that Miller can reasonably and realistically expect to recover at trial, using the cases and the Franklin jury verdict summaries for guidance. The partner will then use this memo in determining the amounts of requested damages to be inserted into the demand letter.

Specific amounts for the damages award to be expected from a trial should be identified. This includes an amount for total compensatory damages with specific amounts for medical expenses, pain and suffering, and lost wages, and an amount for punitive damages. The examinee should explain the analysis resulting in these amounts.

II. FACTS

- Katie Miller is a reporter for her college newspaper and has a blog called RockNation that provides commentary about rock and roll. Miller was very excited to obtain a press pass to go backstage at the Revengers rock concert held at the Franklin City Arena. She hoped to interview the Revengers' famous lead singer and guitarist Steve Trapp after the concert for the newspaper and then post the details of the interview on her blog. Miller has "followed every piece of news" about Trapp's music and personal life; he has been her idol since he joined the Revengers.
- Miller watched the concert offstage with other photographers and journalists. She had her smartphone in her hand, set to record. After the final encore, Trapp walked offstage. Nina Pender, a photographer from *Celebrity* magazine, was in front of the crowd and leaned in to take a picture of Trapp. Trapp asked Pender to stop shooting. He then walked over to Pender, punched her in the nose, and smashed her camera on the ground. Other photographers at the scene and an amateur YouTube video captured the incident. Pender was hospitalized with serious injuries. A police investigation is ongoing, and Pender intends to sue Trapp for $5 million in damages.

- After hitting Pender, Trapp stormed through the crowd of paparazzi and journalists, yelling obscenities and pushing individuals out of his way.
- Trapp yelled at Miller, "Get out of my way, you little punk, or I'll beat the hell out of you." He raised his arm as if he was going to hit her. Miller was "freaking out." Then Trapp grabbed Miller's phone out of her hand and smashed it to the ground. She was holding the phone tightly, and Trapp dislocated her shoulder when he grabbed the phone. She went to the hospital and was in "unbelievable" pain for almost four hours until the doctor popped her shoulder back into place.
- Miller has been "a wreck" since the incident and has found it "devastating."
- Miller has $5,000 in medical bills; her arm was in a sling for three days; she missed a week of part-time work in the school cafeteria, losing $100; and she had to pay $500 to replace her phone.
- Trapp owns a 15-bedroom vacation home in Xanadu, the exclusive Franklin beach resort. The Revengers' most recent album, *Jab*, has received universal acclaim and awards, including 2015 Album of the Year at the Franklin City Music Awards.
- Trapp has had previous run-ins with the law. In 2009, he was charged with possession of illegal drugs; the charges were later dropped. In 2012, he pleaded guilty to misdemeanor assault and battery after attacking his then bodyguard Alex Peel.
- Timothy Howard recently spoke to Trapp's attorney, Saul Leffler, and memorialized the conversation in a memorandum to file. Leffler asserted that Miller does not have meritorious claims for assault and battery and is not entitled to punitive damages. Trapp states that he does not remember touching Miller and that if he did touch her it was accidental. Howard pointed out that Trapp does not need any more bad publicity.

III. LEGAL ISSUES

A. Assault

- An actor is subject to liability for assault if he acts intending to cause a battery or imminent apprehension of a battery and the plaintiff is put in well-founded apprehension of an imminent battery. *Brown v. Orr*.
- Words standing alone cannot constitute an assault. However, they may give meaning to an act, and together, they may create a well-founded fear of a battery in the mind of the person at whom they are directed, thereby constituting an assault. *Holmes v. Nash* (cited in *Brown*).
- In the demand letter, examinees must argue that Trapp's conduct constitutes assault. They should address two issues: (1) that Trapp intended to cause imminent apprehension of a battery, and (2) that Miller was put in well-founded apprehension of an imminent battery.
- The relevant facts indicate that Trapp intended to cause imminent apprehension of an imminent battery in Miller. He said he would "beat the hell" out of her if she did not get out of his way and then raised his arm as if to hit her.

- The facts also demonstrate that Trapp's acts created a well-founded fear of a battery in Miller's mind. Miller had just watched Trapp punch Nina Pender in the face and break her camera. Trapp was pushing journalists and photographers out of his way. Miller observed this conduct and could have formed a well-founded fear that Trapp was about to commit a battery upon her. Trapp specifically threatened to "beat the hell" out of her and then raised his arm as if to hit her. Moreover, Trapp's criminal record includes an assault and battery of his former bodyguard Peel, indicating his willingness to engage in violence. Miller likely knows of this criminal history because she has "followed every piece of news about Steve's music and personal life." While Trapp's drug history is not especially relevant, his attacks of Pender and Peel would contribute to Miller's well-founded fear of a battery.

- Examinees should argue that while "words standing alone cannot constitute an assault," Trapp's verbal threats combined with his physical acts could have created a well-founded fear of a battery in Miller's mind. Examinees can analogize to *Brown v. Orr* in which the court held that an assault may have occurred when the defendant shook his finger in the plaintiff's face and stated that he would "take [her] down anytime, anywhere." Examinees can also rely on *Holmes*, in which the court held that the defendant's acts may have constituted assault when the defendant came to the plaintiff's home, beat on the door, and attempted to pry it open, all while threatening to kill her.

B. Battery

- An actor is subject to liability to another for battery if he or she acts intending to cause a harmful or offensive contact, or an imminent apprehension of such a contact, and a harmful or offensive contact results. *Horton v. Suzuki*. It is sufficient that the defendant intended to cause a contact that turned out to be harmful or offensive; the defendant does not have to have intended that the contact result in harm or offense. *Id*.

- Unpermitted and intentional contact with anything so connected with the body as to be customarily regarded as part of another's person is actionable as an offensive contact with his person. *Polk v. Eugene*. To constitute a battery, it is not necessary to touch the plaintiff's body or even his clothing. Knocking or snatching anything from [a] plaintiff's hand or touching anything connected with his person, when done in an offensive manner, is sufficient to constitute an offensive touching. *Riley v. Adams* (cited in *Polk*).

- The plaintiff must show that the plaintiff did not consent to (or give apparent consent to) the defendant's contact. Consent and apparent consent are relevant to whether there was in fact a harmful or offensive contact. *Horton.*

- In the demand letter, examinees must argue that Trapp's actions constituted a battery. Examinees should address the two components of battery: (1) that Trapp intended to make contact with Miller and a harmful and offensive contact with Miller resulted; and (2) that Miller did not consent to the contact.

- Trapp intended to make contact with Miller when he grabbed her phone on purpose and with such force that he dislocated her shoulder. The resulting contact was both offensive and harmful. (It is sufficient that Trapp intended the contact with Miller, regardless of whether he meant the contact to be harmful or offensive.)

- It was offensive because Trapp made unpermitted and intentional contact with her phone, which was so connected to her body (in her hand) as to be regarded as part of Miller's person.
- The resulting contact was harmful because Trapp dislocated Miller's shoulder and caused pain and suffering.

- Examinees should also address consent. Miller did not consent to having her phone grabbed by Trapp. Nothing about her seeking an impromptu backstage interview with Trapp would signal consent to having her phone forcefully grabbed from her hand. That she was upset as a result of the contact also indicates lack of consent.

C. Compensatory Damages

- A plaintiff in an intentional tort suit like assault or battery can seek compensatory damages for medical expenses, lost wages, and pain and suffering. *Horton*.
- Compensatory damages are mandatory once liability is found. The jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss. *Polk*.
- If Trapp is found liable for assault and/or battery, the jury must award Miller compensatory damages to compensate her for her losses.
    - In the demand letter, examinees should address Miller's eligibility to receive compensatory damages for medical expenses, lost wages, pain and suffering, and her broken phone. The specific amounts requested in the demand letter should be left blank.
    - In the memo to the partner, examinees should list specific amounts as to each type of compensatory damages (medical expenses, lost wages, pain and suffering, and broken phone) that Miller could reasonably and realistically expect to receive at trial and explain their reasoning in arriving at those amounts.
- Certain compensatory damages are straightforward. Miller should be awarded
    - $5,000 in medical expenses to cover her $5,000 in medical bills;
    - $100 for lost wages to compensate her for the $100 in lost wages from missing a week at her part-time job in the school cafeteria; and
    - $500 for the broken phone Miller had to replace.
- Pain and suffering (another category of compensatory damages) includes physical pain as well as mental suffering such as insult and indignity, hurt feelings, and fright. Mental suffering may be inferred from proof of fright caused by a sudden, unprovoked, unjustifiable battery. There is no mathematical formula for assessing the value of pain and suffering; that determination is left to the sound discretion of the trier of fact. *Horton*.
- Miller should be awarded damages for physical pain. She endured "unbelievable" pain for almost four hours until the doctor popped her shoulder back in place. If Miller experienced

pain when Trapp dislocated her shoulder, when the doctor popped her shoulder back in place, or during or after the time she had her arm in a sling, she can seek compensation for that, too.

- Miller may be able to recover for mental suffering, including insult and indignity, hurt feelings, and fright caused by Trapp's conduct. She suffered insult and indignity when Trapp yelled at her, threatened to "beat the hell out of [her]," and grabbed and smashed her phone in front of the other journalists and photographers. Examinees could also argue that Miller should recover for hurt feelings. Trapp was Miller's idol, and she feels devastated by the incident. Miller suffered fright, as she was "freaking out" when Trapp raised his arm as if to hit her, threatened to beat her, and grabbed the cell phone from her hand. Miller has been "a wreck" since the incident.

- In the damages memo, examinees must provide a specific amount that Miller could expect to recover at trial for pain and suffering. To determine a specific amount, examinees should refer to the cases in the Library and the Franklin jury verdict summaries.

- In *Polk*, the jury awarded the plaintiff $1,000 for pain and suffering. The jury found that the defendant subjected Polk to compensable humiliation and indignity when he "forcibly dispossessed plaintiff of his dinner plate" and "shouted in a loud and offensive manner" that the plaintiff could not be served in a private club. In *Horton*, the plaintiff was awarded $6,000 for pain and suffering for being struck on the cheek by his karate instructor.

- The jury verdict summaries provide additional guidance. In *Little v. Franklin Chargers Inc.*, the plaintiff was awarded $40,000 in pain and suffering for the pain of having his shoulder dislocated and the suffering of being humiliated in front of his fiancée and a stadium full of fans. In *Cook v. Matthews Garage*, the plaintiff was awarded $50,000 for pain and suffering when an automobile repair shop employee screamed and cursed at him and broke his arm by pushing him to the floor. In *Alma v. Burgess*, the plaintiff was awarded $400,000 in damages for pain and suffering after she was stabbed and hospitalized for her injuries.

- Examinees should compare the facts of Miller's case to those in the Library and the Franklin jury verdict summaries to arrive at a specific amount for pain and suffering. Miller's pain and suffering damages should be more than the $1,000 in *Polk* where the defendant took the plaintiff's plate and shouted in a loud and offensive manner. They should be less than the $400,000 in *Alma*, as that plaintiff experienced significantly more pain and suffering from being stabbed and was hospitalized. Examinees could suggest an amount similar to the $40,000 awarded in *Little* or the $50,000 awarded in *Cook*. As in *Little*, where the plaintiff's shoulder was dislocated and he was humiliated in front of his fiancée and a stadium full of fans, Miller too had her shoulder dislocated and was humiliated in front of a crowd of journalists and photographers.

- A perceptive examinee will notice that the pain and suffering awards in this problem are about three to five times the amount of the medical expenses. In *Horton*, the medical expenses were $1,500, and the pain and suffering damages were $6,000. In *Cook*, the medical expenses were $10,000, and the pain and suffering damages were $50,000. In *Alma*, the medical expenses were $100,000, and the pain and suffering damages were $400,000. In *Little*, the medical expenses were $12,000, and the pain and suffering damages were $40,000.

- Miller's medical expenses are $5,000. Using the ratio of one to between three and five, a plausible amount for her pain and suffering damages would be between $15,000 and $25,000.

An excellent examinee will analyze pain and suffering damages both by comparing the facts of Miller's case to those of the other cases and by recognizing and applying the multiplier of between three and five between her medical expenses and pain and suffering damages.

D. Punitive Damages

- A plaintiff may seek punitive damages for assault and battery claims. *Horton*.
- Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. *Polk*.
- Punitive damages are awarded in the jury's discretion to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future. The focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. *Id*.
- In assessing punitive damages, the trier of fact can consider (a) the character of the defendant's act (whether it is of the sort that calls for deterrence and punishment); (b) the nature and extent of the harm that the defendant caused or intended to cause; and (c) the wealth of the defendant. *Id*.
- Punitive damages should not be so unrelated to the injury and compensatory damages proven as to plainly manifest passion and prejudice rather than reason and justice. *Id*. Few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. *State Farm v. Campbell*, 538 U.S. 408 (2003) (cited in *Polk*).
- In the demand letter, examinees are expected to make the case that Miller is entitled to punitive damages. Examinees should argue that Trapp's conduct toward Miller was outrageous because of his evil motive or reckless indifference to the rights of others. The facts do not entirely support this proposition, but a credible argument can be made that Trapp's conduct constituting both the assault and the battery could lead a court to award punitive damages.
    - The conduct underlying the assault—Trapp threatening to "beat the hell" out of Miller and acting as if he was about to hit her—shows evil motive.
    - His conduct constituting the battery—forcefully grabbing Miller's phone from her hand and breaking it and dislocating her shoulder—shows evil motive and reckless indifference to the rights of others. Examinees can argue that Trapp was acting with evil motive and reckless indifference to the rights of others as he rampaged through the crowd of journalists and photographers, injuring Miller and pushing others. Grabbing

someone's phone contravenes that person's right to be free from offensive or harmful contacts.

- Examinees should address the negative character underlying Trapp's acts: his yelling at Miller, threatening to beat her, acting like he was going to hit her, and grabbing and smashing her phone. Hostile, threatening, and (somewhat) violent behavior should be deterred and punished.
- Examinees will have a harder time claiming that the nature and extent of the harm to Miller warrants elevated punitive damages. She sustained some harm—a shoulder injury, $5,000 in medical bills, pain and suffering, $100 in lost wages, and a broken phone. While the harm is not especially serious, examinees should argue that it bolsters her eligibility for punitive damages.
- Examinees should claim that punitive damages should be substantial because of Trapp's wealth. While the extent of his financial resources is unknown, Trapp's band the Revengers has had great success. Their most recent album received universal acclaim and was named 2015 Album of the Year. Trapp presumably had substantial financial rewards from this success. His wealth is also reflected by his large vacation home in Xanadu, the exclusive Franklin beach resort.
- In the memo to the assigning partner, examinees must specify an amount Miller is likely to receive for punitive damages if the case goes to trial and their reasoning in choosing that amount. Examinees should use the above factors for assessing punitive damages in their reasoning as to the amount they choose. They should also rely on the Franklin jury verdict summaries, the cases in the Library, and the single-digit ratio rule from *Campbell* in determining and explaining the appropriate amount of punitive damages.
- In *Little*, the plaintiff requested but was not awarded punitive damages after a team mascot tried to pull the plaintiff onto the floor during halftime of a professional basketball game. In *Cook*, the plaintiff was awarded $300,000 after being screamed and cursed at and pushed to the floor, resulting in a broken arm. In *Alma*, the plaintiff was awarded $1,000,000 in punitive damages after being stabbed by the defendant.
- Examinees should request less than the $1,000,000 of punitive damages awarded in *Alma*. In *Alma*, the character of the defendant's act and the nature and extent of the harm to the plaintiff were more severe than the character of Trapp's acts and the harm suffered by Miller. Trapp may be wealthier than the defendant in *Alma*, however. An examinee might request an amount similar to the $300,000 awarded in *Cook*. The character of Trapp's acts is similar to those in that case. The defendant in *Cook* screamed and cursed at the plaintiff, and Trapp yelled at and threatened Miller. The defendant in *Cook* used minor violence (pushing the plaintiff), and Trapp too used minor violence by grabbing and smashing Miller's phone. Again, Trapp's wealth is likely greater than that of the defendant in *Cook*, thus perhaps justifying a higher award.
- In *Little* and *Horton* the plaintiffs were not awarded punitive damages. Examinees may choose to distinguish the facts of Miller's case from the facts of these cases.

- Under the single-digit ratio rule from *Campbell*, the punitive damages amount must be only up to nine times the total compensatory damages award. Here, Miller's compensatory damages will be $5,600 ($5,000 in medical expenses + $100 in lost wages + $500 for the broken phone) plus the amount the examinee has chosen for pain and suffering. For instance, if the examinee concludes that $20,000 is the amount of pain and suffering damages likely to be awarded, the total compensatory damages will be $25,600 ($20,000 + $5,600). Then, under the *Campbell* rule, the punitive damages should not exceed $230,400 (9 x $25,600).
    - Excellent examinees will use the factors for assessing punitive damages, the jury verdict summaries, the cases in the Library, and the *Campbell* single-digit ratio in reaching and explaining the amount of punitive damages.

July 2015 MPT: *In re Bryan Carr*

File

Anders, Davis & Waters
Attorneys at Law
6241 Lowell Street
Franklin City, Franklin 33205

To: Examinee
From: Miles Anders
Re: Bryan Carr
Date: July 28, 2015

My friend and former college roommate Bryan Carr has consulted me about a credit card problem he is facing. I offered to help him figure out a strategy for responding.

Bryan's mother died last year. Since then his father, Henry Carr, has become more and more dependent upon Bryan. Several months ago, Henry asked Bryan if Bryan could pay the estimated $1,500 it would take to repair Henry's van. Bryan gave his credit card to Henry and told him that he could charge all the repairs but could not use the card for anything else. Bryan also gave Henry a letter that said Bryan was giving Henry permission to use the card. In the end, the total repair cost was $1,850, which was charged to Bryan's card.

Bryan forgot to get the credit card and letter back from his father, and Henry used the card to buy several things in addition to the auto repairs. Over several months, Henry charged gasoline, groceries, books, and, most recently, power tools to Bryan's account. Bryan always pays the entire balance on his credit cards each month, and he had already paid for the first three months of purchases without noticing Henry's charges. However, earlier this month, Bryan discovered the unauthorized purchases. He promptly contacted the bank that issued the card to dispute the charges. The bank has notified him that he is responsible for all charges.

Bryan would like our advice about his legal obligation to pay the bank for the charges Henry made in March, April, May, and June, as detailed in the statements for these months. Please draft an opinion letter for my signature to Bryan. This letter should advise Bryan of the extent of his liability for each of Henry's purchases. The letter should follow the attached firm guidelines for opinion letters.

Anders, Davis & Waters
Attorneys at Law
6241 Lowell Street
Franklin City, Franklin 33205

OFFICE MEMORANDUM

To: Associates
From: Managing partner
Re: Opinion letters
Date: September 5, 2013

The firm follows these guidelines in preparing opinion letters to clients:

- Identify each issue separately and present each issue in the form of a "yes or no" question. (E.g., Is the client's landlord entitled to apply the security deposit to the back rent owed?)

- Following each issue, provide a concise one- or two-sentence statement which gives a "short answer" to the question.

- Following the short answer, write a more detailed explanation and legal analysis of each issue, incorporating all important facts and providing legal citations. Explain how the relevant legal authorities combined with the facts lead to your conclusions.

- Bear in mind that, in most cases, the client is not a lawyer; avoid using legal jargon. Remember to write in a way that allows the client to follow your reasoning and the logic of your conclusions.

Transcript of telephone conversation between Miles Anders and Bryan Carr
July 24, 2015

Anders: Bryan, I heard your voicemail message. I'm sorry you are having problems, and I'd like to help. Can you tell me what happened?

Carr: Well, you know that my mom died late last year. My dad has been devastated. They were married for 40 years. My mom had always organized and maintained their household and paid all the bills. Now my dad is pretty much at a loss for how to cope. Even though this is a busy season for my landscaping business, I've tried to step in to support him as much as I can, including paying some of his bills. It's been tough keeping up with all that's going on.

Anders: Can you tell me more about your dad's situation? I'm asking because I understand that this has contributed to your current problem.

Carr: About four months ago, my dad came to me after his van broke down. He had gotten a repair estimate for $1,500, and he didn't have the money on hand to pay for the repairs. I decided to help him out and told him I would pay whatever it cost to have his van repaired. I also told my dad it was a loan, but honestly, I was never going to ask him to pay me back. I love my dad and wanted to help him in his time of need.

Anders: How did you give him the money?

Carr: I let him use one of my credit cards. It seemed the easiest thing to do at the time. I had a card that had a zero balance on it. It's with Acme State Bank. When I gave my dad the credit card, I told him that he could charge the van repairs, but I also specifically told him that that was the only purchase or charge he should make on the card.

Anders: Did you do anything else?

Carr: Yes, I wrote a letter that said that my dad was authorized to use my credit card and gave it to him. I think I also wrote the credit card account number and expiration date on the letter. I made a copy of the letter and have it in my desk. I will scan it and email it to you as soon as we get off the phone.

Anders: Did the letter say anything about restricting the purchase specifically to the van repairs?

Carr: No, it didn't.

Anders: Did your dad charge the repairs?

Carr: Yes, my dad used my Acme State Bank card to pay for the van repairs. The final bill was somewhat more than the original estimate. Apparently an additional part was needed, making the total repair cost $1,850. That was $350 more than the original estimate. My dad charged the total amount to my credit card.

Anders: Then what happened?

Carr: With all that was going on in my life, I forgot to get my credit card back from my dad until about six weeks ago. When I finally did, I also got back the letter I'd given him. Unfortunately, I subsequently learned that my dad had already used the card to make additional purchases without ever asking my permission or even telling me. In fact, he even used my account information after returning the card and letter.

Anders: How did you find out about the additional purchases?

Carr: When I was reviewing and preparing to pay my current credit card statement, I noticed a $1,200 charge to Franklin Hardware Store for power tools. I knew I had not made this purchase. I called my dad to see if he knew anything about the power tools purchase.

Anders: What did your dad say?

Carr: He admitted he had used my account number to buy the power tools. He told me he wanted to prove to himself and the rest of the family that he could take care of the house, and he impulsively went to buy some tools to make some household repairs. He said he had written the account information on a piece of paper before returning the credit card and my letter to me.

Because my dad had already returned the credit card and my letter to me before he purchased the tools, he said he merely presented the credit card account name, number, and expiration date to the hardware store clerk. The clerk must have been out of his mind, but he accepted the information my dad presented and charged the tools to my account. My dad feels terrible and has apologized profusely. He is so ashamed of himself.

Anders: Are these the only other charges your dad made?

Carr: I wish. He also admitted that before he returned my card, he had used it to buy gas, groceries, and books over the past few months.

Anders: What did you do after you learned of all these transactions?

Carr: I pulled out my file with my Acme State Bank credit card statements and reviewed my statements for the past several months. Sure enough, upon review, I noticed that during the past four months, in addition to the van repairs, my dad had charged gasoline on two occasions at Friendly Gas, groceries on one occasion at the Corner Market, books at Rendell's Book Store, and most recently, the power tools at the Franklin Hardware Store. I always pay the entire balance on my credit cards on the due date each month. All the gas, grocery, and book charges made by my dad have already been paid in full. I noted this fact by writing "Paid—BC" on each of the past statements. I never noticed these charges before I paid my statements. The truth is, I usually don't review the bills very carefully, and I didn't notice the gas, grocery, and book charges because he and I both shop at the same places. I probably gave each statement a quick glance, if that. However, I have not yet paid the current credit card statement for June with the $1,200 power tools charge.

Anders: Have you contacted the bank or done anything else?

Carr: I called the bank to discuss the problem. They directed me to fill out and send in their form disputing the charges. I did this right away.

Anders: What happened?

Carr: This morning I received a letter from the bank informing me that I was responsible for all the charges. That's when I called your office.

Anders: What would you like to see happen?

Carr: I know my dad did something he shouldn't have done; I told him to return the tools if he still could. But he's a senior citizen and in considerable distress. The various vendors should not have allowed him to use my credit card. I know he had the card in his possession for all but the power tools purchase, but it's still not right for the bank to say I'm responsible. I'd like to know whether the bank can hold me responsible for each of the charges my dad made.

Anders: Bryan, we'll look into this quickly. Meanwhile, please don't pay your credit card statement until you get further advice from us. I'll be back in touch before the current payment due date.

March 12, 2015

To Whom It May Concern:

I, Bryan Carr, give my father, Henry Carr, permission to use my Acme State Bank credit card: account number 474485AC66873641, expiration date 09/2017. If you have any questions, please feel free to call me at 555-654-8965.

Thank you,

Bryan Carr

____

Bryan Carr

ACME STATE BANK

P.O. Box 309
Evergreen, Franklin 33800

Billing Statement: March 2015

Bryan Carr
6226 Lake Drive
Franklin City, FR 33244

Account Number 474485AC66873641

New Charges

DATE	DESCRIPTION	AMOUNT
March 16, 2015	Schmidt Auto Repair	$1,850.00
	Total	$1,850.00

Payment Due Date	Minimum Due
April 30, 2015	$55.50

DIRECT ALL INQUIRIES TO
(800) 555-5555

MAKE ALL CHECKS PAYABLE TO
Acme State Bank
P.O. Box 309
Evergreen, FR 33800

THANK YOU FOR YOUR BUSINESS!

PAID-BC April 29, 2015

ACME STATE BANK

P.O. Box 309
Evergreen, Franklin 33800

Billing Statement: April 2015

Bryan Carr
6226 Lake Drive
Franklin City, FR 33244

Account Number 474485AC66873641

April 30, 2015	Payment Received	$1,850.00

New Charges

DATE	DESCRIPTION		AMOUNT
April 10, 2015	Friendly Gas Station		$75.00
April 16, 2015	Corner Store		$55.00
April 21, 2015	Friendly Gas Station		$76.50
		Total	$206.50

Payment Due Date	Minimum Due
May 31, 2015	$15.00

DIRECT ALL INQUIRIES TO
(800) 555-5555

MAKE ALL CHECKS PAYABLE TO
Acme State Bank
P.O. Box 309
Evergreen, FR 33800

THANK YOU FOR YOUR BUSINESS!

PAID-BC May 30, 2015

ACME STATE BANK
P.O. Box 309
Evergreen, Franklin 33800

Billing Statement: May 2015

Bryan Carr
6226 Lake Drive
Franklin City, FR 33244

Account Number 474485AC66873641

May 31, 2015	Payment Received	$206.50

New Charges

DATE	DESCRIPTION	AMOUNT
May 16, 2015	Rendell's Book Store	$45.70
	Total	$45.70

Payment Due Date	Minimum Due
June 30, 2015	$15.00

DIRECT ALL INQUIRIES TO
(800) 555-5555

MAKE ALL CHECKS PAYABLE TO
Acme State Bank
P.O. Box 309
Evergreen, FR 33800

THANK YOU FOR YOUR BUSINESS!

PAID-BC June 29, 2015

ACME STATE BANK
P.O. Box 309
Evergreen, Franklin 33800

Billing Statement: June 2015

Bryan Carr
6226 Lake Drive
Franklin City, FR 33244

Account Number 474485AC66873641

June 30, 2015	Payment Received	$45.70

New Charges

DATE	DESCRIPTION	AMOUNT
June 21, 2015	Franklin Hardware Store—power tools	$1,200.00
	Total	$1,200.00

Payment Due Date	Minimum Due
July 31, 2015	$36.00

DIRECT ALL INQUIRIES TO
(800) 555-5555

MAKE ALL CHECKS PAYABLE TO
Acme State Bank
P.O. Box 309
Evergreen, FR 33800

THANK YOU FOR YOUR BUSINESS!

July 2015 MPT: *In re Bryan Carr*

Library

Excerpts from Federal Truth in Lending Act
15 U.S.C. §§ 1602 and 1643

§ 1602 Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

. . .

(k) The term "credit card" means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

. . .

(o) The term "unauthorized use," as used in section 1643 of this title, means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

*   *   *

§ 1643 Liability of holder of credit card

(a) Limits on liability

(1) A cardholder shall be liable for the unauthorized use of a credit card only if—

(A) the card is an accepted credit card;

(B) the liability is not in excess of $50;

. . .

(E) the unauthorized use occurs before the card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as a result of loss, theft, or otherwise; and

(F) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.

. . .

(d) Exclusiveness of liability. Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.

Excerpts from Restatement (Third) of Agency (2006)

§ 1.01 Agency Defined

Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

§ 2.01 Actual Authority

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.

§ 2.03 Apparent Authority

Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.

§ 3.01 Creation of Actual Authority

Actual authority, as defined in § 2.01, is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf.

§ 3.03 Creation of Apparent Authority

Apparent authority, as defined in § 2.03, is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.

§ 3.11 Termination of Apparent Authority

(1) The termination of actual authority does not by itself end any apparent authority held by an agent.

(2) Apparent authority ends when it is no longer reasonable for the third party with whom an agent deals to believe that the agent continues to act with actual authority.

BAK Aviation Systems, Inc. v. World Airways, Inc.

Franklin Court of Appeal (2007)

In 2005, BAK Aviation Systems, Inc. (BAK), issued a credit card to World Airlines, Inc. (World), to purchase fuel for a corporate jet leased by World from BAK. World designated Ken Swenson, an independent contractor hired by World, as chief pilot of the leased jet and gave him permission to make fuel purchases with the BAK credit card but only in connection with *non-charter* flights involving World executives. However, Swenson used the credit card to charge $89,025 to World in connection with *charter* flights involving non-World customers prior to the cancellation of the credit card in 2006. When World refused to pay, BAK sought recovery in court.

The trial court entered judgment for BAK for the full amount in dispute. The court held that the federal Truth in Lending Act, which limits a cardholder's liability for "unauthorized" uses, did not apply to charges incurred by one to whom the cardholder had voluntarily allowed access for another purpose. World appeals.

The Truth in Lending Act, 15 U.S.C. § 1643(a), places a limit of $50 on the liability of a credit cardholder for charges incurred by an "unauthorized" user. This appeal concerns the applicability of this provision to a card bearer who was given permission by the cardholder to make a limited range of purchases but who subsequently made additional charges on the card. We conclude that Swenson, who incurred the charges, was not an "unauthorized" user within the meaning of § 1643(a) and therefore affirm.

Congress enacted the 1970 Amendments to the Truth in Lending Act in large measure to protect credit cardholders from unauthorized use perpetrated by those able to obtain possession of a card from its original owner. The amendments limit the liability of cardholders for all charges by third parties made without "actual, implied, or apparent authority" and "from which the cardholder receives no benefit." 15 U.S.C. §§ 1602(o), 1643. Where an unauthorized use has occurred, the cardholder can be held liable only up to a limit of $50 for the amount charged on the card, if certain conditions are satisfied. 15 U.S.C. § 1643(a)(1)(B).

By defining "unauthorized use" as that lacking "actual, implied, or apparent authority," Congress intended, and courts have accepted, primary reliance on principles of agency law in determining the liability of cardholders for charges incurred by third-party card bearers. Under the parameters established by Congress, the inquiry into "unauthorized use" properly focuses on whether the user acted as the cardholder's agent in incurring the debt in dispute. A cardholder, as principal, can create actual authority only through manifestations to the user of consent to the particular transactions into which the user has entered. *See* RESTATEMENT (THIRD) OF AGENCY § 3.01.

"Implied authority" has been held to mean actual authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent's express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestations in light of the principal's objectives and other facts known to the agent. These meanings are not mutually exclusive. Both fall within the definition of actual authority. *See* RESTATEMENT (THIRD) OF AGENCY § 2.02, comment (b).

With respect to the transactions Swenson made in connection with the charter flights, we conclude that no actual or implied authority existed.

Unlike actual or implied authority, however, apparent authority exists entirely apart from the principal's manifestations of consent to the agent. Rather, the cardholder, as principal, creates apparent authority through words or actions that, reasonably interpreted by a third party from whom the card bearer makes purchases, indicate that the card bearer acts with the cardholder's consent. *See* RESTATEMENT (THIRD) OF AGENCY § 3.03.

Though a cardholder's relinquishment of possession of a credit card may create in another the appearance of authority to use the card, the statute clearly precludes a finding of apparent authority where the transfer of the card was without the cardholder's consent, as in cases involving theft, loss, or fraud. However elastic the principle of apparent authority may be in theory, the language of the 1970

Amendments demonstrates Congress's intent that charges incurred as a result of *involuntary* card transfers are to be regarded as unauthorized under §§ 1602(o) and 1643.

Because the Truth in Lending Act provides no guidance as to uses arising from the *voluntary* transfer of credit cards, the general principles of agency law, incorporated by reference in § 1602(o), govern disputes over whether a resulting use was unauthorized. These disputes frequently involve, as in this case, a cardholder's claim that the card bearer was given permission to use a card for only a limited purpose and that subsequent charges exceeded the consent originally given by the cardholder. Acknowledging the absence of actual authority for the additional charges, a majority of courts have declined to apply the Truth in Lending Act to limit the cardholder's liability, reasoning that the cardholder's voluntary relinquishment of the card for one purpose gives the bearer apparent authority to make additional charges. (Citations omitted.)

Nothing about the BAK credit card itself, or the circumstances surrounding the purchases, gave fuel sellers reason to distinguish the authorized fuel purchases Swenson made for the *non-charter* flights from the disputed purchases for the *charter* flights. It was industry custom to entrust credit cards used to make airplane-related purchases to the pilot of the plane. By designating Swenson as the pilot and subsequently giving him the BAK card, World thereby imbued him with more apparent authority than might arise from voluntary relinquishment of a credit card in other contexts. In addition, with World's blessing, Swenson had used the card, which was inscribed with the registration number of the Gulfstream jet, to purchase fuel on non-charter flights for the same plane. The only difference between those uses expressly authorized and those now claimed to be unauthorized—the identity of the passengers—was insufficient to provide notice to those who sold the fuel that Swenson lacked authority for the charter flight purchases.

Here, the disputed charges were not "unauthorized" within the meaning of 15 U.S.C. §§ 1602(o) and 1643(a)(1). Accordingly, BAK was entitled to recover the full value of the charges from World under their credit agreement. The judgment of the trial court is affirmed.

Transmutual Insurance Co. v. Green Oil Co.

Franklin Court of Appeal (2009)

This is an appeal from a holding of the trial court finding against defendant Green Oil Co. and in favor of plaintiff Transmutual Insurance Co. In March 2000, Transmutual obtained a Green Oil credit card for use in its business. Transmutual's office manager, Donna Smith, was responsible for requesting credit cards for Transmutual employees and paying bills. Smith did not have the authority to open new credit accounts for Transmutual; only its general manager had this authority.

On May 16, 2005, Smith made a written request to Green Oil for a GreenPlus credit card. A GreenPlus credit card may be used for purchases of goods and services other than those furnished at gasoline service stations. The GreenPlus application was signed by Smith as office manager. It also contained a signature purporting to be that of Alexander Foster as general manager and secretary-treasurer of Transmutual; however, the trial court determined that Foster's signature was forged by Smith.

During the period from May 2005 until July 2008, Smith wrongfully and fraudulently used the GreenPlus card to obtain goods and services in the amount of $26,376.53. Transmutual paid for these purchases with checks signed by Smith and an authorized officer. During this time, Transmutual employed accounting firms to perform audits, but they did not discover the fraud.

Under the federal Truth in Lending Act, 15 U.S.C. § 1643(a), a cardholder is liable only for a limited amount if certain conditions are met and if the use of the credit card was unauthorized. Accordingly, the initial determination is whether or not the use of the credit card in the case at hand was unauthorized. The federal definition of "unauthorized use" is "a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit." 15 U.S.C. § 1602(o). The test for determining unauthorized use is governed by agency law, and agency law must be used to resolve this issue.

Smith did not have actual or implied authority to request a GreenPlus credit card.

The trial court correctly determined that the principle of apparent authority controls in this case.

Apparent authority is created when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation of the principal. RESTATEMENT (THIRD) OF AGENCY § 3.03. Transmutual is bound by Smith's acts under apparent authority only to third persons who have incurred a liability in good faith and without ordinary negligence. The trial court correctly determined that Green Oil acted negligently by issuing Smith a GreenPlus credit card without independently verifying her authority. Because of Green Oil's negligence, the trial court determined that Green Oil, as the card issuer, could not rely upon Smith's ostensible authority to establish the existence of agency between Smith and Transmutual.

However, the trial court erred in not looking beyond Green Oil's negligence in issuing Smith the card. After receiving the first statement from Green Oil containing the fraudulent charges, Transmutual was negligent in not finding and reporting Smith's fraud. If the person or entity to whom a credit card is issued is careless, that person or entity may be held liable.

The federal Truth in Lending Act does not address whether cardholder negligence removes the statutory liability limit. However, we believe that Transmutual's negligence in not examining its monthly statements from Green Oil removes this case from the statutory limit on cardholder liability.

A cardholder has a duty to examine his credit card statement promptly, using reasonable care to discover unauthorized signatures or alterations. If the card issuer uses reasonable care in generating the statement and if the cardholder fails to examine his statement, the cardholder is precluded from asserting his unauthorized signature against the card issuer after a certain time.

The facts at hand are similar. Green Oil was not negligent in billing Transmutual. If someone at Transmutual other than Smith had examined its statements from Green Oil, he or she would have discovered Smith's fraud. Transmutual had the responsibility to institute internal procedures for the examination of the statements from Green Oil which would have disclosed Smith's deception. Transmutual had sole power to do so. Transmutual's failure to institute such procedures is the cause of that portion of the embezzlement that occurred following the billing from Green Oil that contained the first evidence of Smith's fraud.

Transmutual's negligence leads us to reexamine whether Smith acquired apparent authority in her use of the GreenPlus card after Transmutual became negligent. In *Farmers Bank v. Wood* (Franklin Ct. App. 1998), we set forth the test to determine whether or not apparent authority exists. The authority must be based upon a principal's conduct which, reasonably interpreted, causes a third person to believe that the agent has authority to act for the principal.

> Thus, if a principal acts or conducts his business, either intentionally or through negligence, or fails to disapprove of the agent's acts or course of action so as to lead the public to believe that his agent possesses authority to act or contract in the name of the principal, the principal is bound by the acts of the agent within the scope of his apparent authority as to persons who have reasonable grounds to believe that the agent has such authority and in good faith deal with him.

Farmers Bank, *supra*.

Green Oil was negligent in issuing Smith the GreenPlus card. However, during Smith's fraudulent use of the card, Green Oil was not negligent. Rather, Transmutual (the cardholder) was negligent in not requiring that someone other than Smith examine its monthly statements. Smith embezzled money from Transmutual for three years through her fraudulent use of the GreenPlus credit card. During this lengthy period of embezzlement, Transmutual always paid its monthly bill to Green Oil.

Transmutual contends that it is not proper for the court to consider the fact that Transmutual paid all the Green Oil credit card charges. That contention is without merit. As a result of Transmutual's acts of paying the charges and its failure to examine its credit card statements so that it could notify Green Oil of the fraud, Transmutual allowed Green Oil to reasonably believe that Smith was authorized to use the credit card.

We conclude under the principles of apparent authority that Transmutual is liable for all of Smith's purchases from the time the credit card was issued.

Reversed.

July 2015 MPT: *In re Bryan Carr*

Point Sheet

This July 2015 MPT Point Sheet was provided to bar examiners to assist in grading the examination. It addresses the factual and legal points encompassed within the MPT. While it is illustrative of the discussions that might have appeared in excellent responses constructed by examinees, it is more detailed than examinee responses were expected to be.

In re Bryan Carr

DRAFTERS' POINT SHEET

In this performance test, examinees are associates at the law firm Anders, Davis & Waters. The firm represents Bryan Carr and is advising him about his potential liability for certain credit card purchases made by his father, Henry Carr, using Bryan's credit card account. There are a number of credit card transactions; the transactions were made under different circumstances and have differing operative facts. Examinees are asked to draft an opinion letter to the client for the partner's signature. In the letter, examinees are to analyze each of the credit card transactions in light of the facts, relevant statutes, and case law to determine the client's responsibility for payment for each charge. Examinees should incorporate key facts into their discussions and should state the reasons and cite the authorities supporting their conclusions.

The File contains the instructional memorandum from the supervising partner, the firm's guidelines for drafting opinion letters, a transcript of the partner's telephone conversation with the client, a copy of a letter the client wrote authorizing his father to use the credit card, and credit card statements for the four months at issue. The Library contains various sections of the federal Truth in Lending Act ("TILA"), excerpts from the Restatement (Third) of Agency, and two cases.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

Examinees' work product should resemble an objective opinion letter to a client. They are told that the client is a former college roommate of the partner and that he is a local businessman. Examinees are instructed that the letter should set out the key facts and issues, analyze and provide citations to the relevant legal authorities, and explain how the facts and law lead to their conclusions. Examinees need not write a separate statement of facts but must use the facts in the File to support their analyses and conclusions. They are told to follow the firm guidelines on opinion letters.

II. FACTUAL BACKGROUND

The firm's client, Bryan Carr, is a friend and former college roommate of Miles Anders, one of the firm's partners. Bryan is a college graduate and owns a landscaping business in Franklin. Bryan has retained the firm to help him with a credit card problem he is having with the bank that issued one of his credit cards, Acme State Bank. The problem revolves around a series of charges made by Bryan's father, Henry Carr, using Bryan's account. Bryan wants the firm's legal advice about his potential liability for each of the charges.

Bryan's mother died last year; since that time his father, Henry Carr, has become more and more dependent upon Bryan. Several months ago, Henry came to Bryan after his van broke down. The repair estimate was $1,500, and Henry did not have the ability to pay. Bryan gave

Henry one of his credit cards that had a zero balance and told Henry that he could charge the van repairs, but Bryan told Henry that the repair bill was the only thing for which he should use the credit card. Bryan also gave his father a note that stated that he was giving his father permission to use his credit card. The note was signed and dated, and it included the account number and the card's expiration date. The note did not limit the use of the credit card to a particular merchant, nor did it indicate an expiration date for the authorization.

Henry Carr did in fact use Bryan's credit card at Schmidt Auto Repair. However, the final bill was $1,850 due to an additional $350 part that was needed. Henry charged the entire $1,850 to Bryan's account. Upon receiving the billing statement with this charge, Bryan paid the statement in full on April 29, 2015.

Over the following months, Bryan's father charged gasoline twice at Friendly Gas Station, groceries at the Corner Store, and books at Rendell's Book Store. At the time of these purchases, Henry Carr still had physical possession of the credit card and Bryan's note; Bryan had forgotten to retrieve them from his father. Bryan did not review his credit card statements carefully and had already paid these gas, grocery, and book charges in full before he called the law firm for advice.

About six weeks ago, Bryan asked his father to return his Acme State Bank credit card and the note that he had written. Henry returned both, but without telling Bryan about the gas, grocery, and book purchases he had made before returning the card. Nor did Henry tell Bryan that he had written down Bryan's account information on a piece of paper that he had retained.

Most recently, Henry Carr purchased power tools at the Franklin Hardware Store using Bryan's account. At the time of this final purchase, Henry no longer had in his possession the actual credit card or the note from Bryan. Instead, he merely presented the hardware store clerk with the account name, number, and expiration date, and the clerk allowed the purchase. The credit card statement for June came, and this time Bryan reviewed the statement and noticed the $1,200 power tools purchase. Knowing that he had not bought any power tools, Bryan asked his father if he knew anything about it. His father confessed that he had purchased the tools and apologized. He also told Bryan about the gas, groceries, and books he had charged. These other charges have already been paid in full; only the Franklin Hardware Store charge remains unpaid.

After talking to his father, Bryan immediately contacted the Acme State Bank, the card issuer, and disputed all the charges. The bank has notified Bryan that it has rejected his position and contends that he is 100 percent responsible for all charges. Bryan would like the law firm's opinion about his legal responsibilities to pay the bank for each of his father's transactions using his credit card.

III. ANALYSIS

The problem requires examinees to analyze three groups of credit card purchases; each of the three groups may involve a different analysis and outcome based on the facts surrounding each purchase.

<u>Overarching Issue:</u>

Does Bryan Carr have liability as a cardholder for the purchases made by his father under the federal Truth in Lending Act? In other words, did Henry Carr have actual, implied, or apparent authority for each of the credit card purchases he made using Bryan's account? If not, were the purchases "unauthorized" within the meaning of § 1602(o) of TILA?

<u>Analysis of Each Group of Charges:</u>

(1) Is Bryan responsible for the Schmidt Auto Repair charge?

Short Answer:

- Bryan Carr is responsible for the entire $1,850 charge from Schmidt Auto Repair. Bryan created *actual* authority for Henry Carr to use his credit card for the first $1,500 and created *implied* authority, which is part of actual authority, for the additional $350.

Facts

- Henry told Bryan that the estimate for his van repairs was $1,500.
- Bryan told Henry that he would pay "whatever it cost" to have Henry's van repaired.
- Bryan gave Henry permission both orally and in writing to use his credit card to pay for Henry's van repairs.
- The total repair cost was $1,850.
- Henry in fact used Bryan's credit card to pay the $1,850 charge.

Analysis

- Congress apparently contemplated, and courts have accepted, primary reliance on principles of agency law in determining the liability of cardholders for charges incurred by third-party card bearers. Under the parameters established by Congress, the inquiry into "unauthorized use" properly focuses on whether the user acted as the cardholder's agent in incurring the debt in dispute. (*BAK Aviation Sys., Inc. v. World Airways, Inc.*)

- Under the facts of this transaction, Bryan did give Henry actual authority. Actual authority is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent may take action on the principal's behalf. Here, Bryan physically gave Henry his credit card, gave him oral permission to use it, and also provided a signed letter stating "I, Bryan Carr, give my father, Henry Carr, permission to use my Acme State Bank credit card . . . ." These actions, taken by Bryan, would allow Henry to reasonably believe that Bryan wished for him to take action on his behalf. Additionally, as stated in *BAK Aviation*, a cardholder, as principal, can create actual authority through manifestations to the user of consent to the particular transactions into which the user has entered. Here, Bryan provided consent to a particular transaction—namely, the Schmidt Auto Repair transaction. As a result, he created actual authority for Henry to act on his behalf.

- Even though the original estimate was for $1,500, Bryan is responsible for the additional $350 under the concept of implied authority. "Implied authority" is often used to mean actual authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent's express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestations in light of the principal's objectives and other facts known to the agent. These meanings are not mutually exclusive. Both uses of the term *implied* fall within the definition of *actual* authority. *See BAK Aviation*. Here, Henry (as agent) acted in a manner in which he believed Bryan (as principal) wished Henry to act based on Henry's reasonable interpretation of Bryan's statement that he would pay for the total repair costs.

(2) Is Bryan responsible for the charges at Friendly Gas Station, the Corner Market, and Rendell's Book Store?

Short Answer:

- Bryan Carr is responsible for all the gas, grocery, and book transactions because he created *apparent* authority in Henry Carr to use his credit card during the period in which these charges were made.

Facts

- Henry, over a two-month period subsequent to the van repairs, charged various transactions to the Acme State Bank credit card Bryan provided him to use at the auto repair shop. Henry did not have permission from Bryan to use the credit card for these additional transactions. However, Henry still had physical possession of the credit card and the written authorization letter provided by Bryan. Furthermore, Bryan paid the credit card statements for April and May that detailed these purchases in full and apparently did not review the credit card statements carefully to see exactly what had been charged. (Bryan explained in the client interview that he and his father shop at the same stores.) Therefore, Bryan paid the gas, grocery, and book charges without ever noticing that his father must have used his card for them.

Analysis

- Bryan created apparent authority in Henry Carr to use his credit card. Apparent authority is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation. RESTATEMENT (THIRD) OF AGENCY.

- As stated in *BAK Aviation*, the cardholder, as principal, creates apparent authority through words or actions that, reasonably interpreted by a third party from whom the card bearer makes purchases, indicate that the card bearer acts with the cardholder's consent. Here, the merchants, as the third parties, could have reasonably interpreted that apparent authority was created through Bryan's actions: Bryan provided Henry with his credit card and also provided a written statement that said "I, Bryan Carr, give my father, Henry Carr, permission to use my Acme State Bank credit card . . . ." The written statement did not limit the card's use to a specific transaction or a specific merchant. Therefore, it would be reasonable for any merchant to conclude that Henry had Bryan's authority to use his credit card.

- Because Bryan led the public to believe that Henry had apparent authority, he is bound by Henry's actions. The court in *Transmutual Insurance Co. v. Green Oil Co.* made this clear when it said, "[I]f a principal acts or conducts his business, either intentionally or through negligence, or fails to disapprove of the agent's acts or course of action so as to lead the public to believe that his agent possesses authority to act or contract in the name of the principal, the principal is bound by the acts of the agent within the scope of his apparent authority as to persons who have reasonable grounds to believe that the agent has such authority and in good faith deal with him" (citing *Farmers Bank v. Wood* (Franklin Ct. App. 1998)).

- Moreover, the fact that Bryan voluntarily relinquished his credit card to Henry, even if only for one purpose, gives Henry the apparent authority to make additional charges. This is supported by *BAK Aviation*, in which the court wrote, "[T]he cardholder's voluntary relinquishment of the card for one purpose gives the bearer apparent authority to make additional charges."

- An additional point can be made: Bryan's claim against the bank that the charges were unauthorized transactions is adversely affected by his own negligence. "A cardholder has a duty to examine his credit card statement promptly, using reasonable care to discover unauthorized signatures or alterations. If the card issuer uses reasonable care in generating the statement and if the cardholder fails to examine his statement, the cardholder is precluded from asserting his unauthorized signature against the card issuer after a certain time." *Transmutual Insurance*. Given the facts, it appears that Bryan did not examine his statement using reasonable care to discover unauthorized charges. The alleged unauthorized gas, grocery, and book transactions appear on the second and third of the four credit card statements. These were the only transactions on each statement. Bryan paid the statement balances for April and May, in full, without alleging any unauthorized use. This could lead one to conclude that Bryan did not use reasonable care in examining his statements.

- Some examinees may suggest that Bryan is responsible for only the first \$50 of each charge, which would include the entire amount charged at Rendell's Book Store (\$45.70). This is incorrect. TILA § 1643(a) refers to liability limits for *unauthorized* use of a credit card. The charges made at the gas station, grocery store, and book store were all authorized charges, made when Henry had apparent authority to use the card. A more perceptive examinee might note the \$50 limit in § 1643(a) but correctly state that, since all charges were authorized, the \$50 limit does not apply.

(3) Is Bryan responsible for the Franklin Hardware Store charge?

Short Answer:

- Henry did not have actual, implied, or apparent authority for the power tools purchase. Bryan will be responsible only for the first $50 of the Franklin Hardware Store transaction because, under TILA, this was an unauthorized purchase.

Facts

- Bryan took the credit card and authorization letter back from Henry before Henry purchased the power tools at Franklin Hardware. However, without Bryan's knowledge or permission, Henry wrote down the credit card number and other information on a separate sheet of paper.

- Henry purchased power tools at Franklin Hardware by providing only the credit card account name, number, and expiration date to the store clerk—he was no longer in possession of the card or the authorization letter.

Analysis

- When he made the power tools purchase, Henry was in possession of only the credit card number and expiration date, which he had hand-copied on a sheet of paper; he did not possess the card itself. These circumstances should not create apparent authority. As stated in *BAK Aviation*, the cardholder, as principal, creates apparent authority through words or actions that, reasonably interpreted by a third party from whom the card bearer makes purchases, indicate that the card bearer acts with the cardholder's consent. Given that Henry had only a credit card number written on a piece of paper, it would be unreasonable for a third party to interpret Henry's actions as being sanctioned by Bryan. Therefore, under § 3.11 of the Restatement of Agency (Third), Henry's apparent authority to use Bryan's credit card had been terminated.

- Furthermore, the merchant could be seen as being negligent in allowing Henry to use Bryan's credit card, since the only thing Henry possessed was a handwritten account number on a piece of paper.

- The court in *Transmutual* made it clear that a principal would not be held responsible for the actions of an agent if the third party was negligent. "[The principal] is bound by [the agent's] acts under apparent authority only to third persons who have incurred a liability in good faith and without ordinary negligence." *Transmutual*. Here, it was unreasonable for the Franklin Hardware Store clerk to allow Henry to charge a purchase to Bryan's credit card account when Henry did not have possession of the card or the authorization letter. The Franklin Hardware Store did not make the sale "without ordinary negligence."

- As a result of Henry not having apparent authority to use Bryan's credit card when buying the power tools, and because there are no facts to suggest that Bryan gave Henry actual authority or implied authority for this transaction (to the contrary, Bryan had told Henry that the card was to be used only for getting the van repaired), this was an unauthorized use of Bryan's credit card.

- The term “unauthorized use” is defined in § 1602(o) of TILA as “a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.” Because this is considered an unauthorized use, according to § 1643(a)(1)(B) of TILA, Bryan is responsible for only the first $50 of the unauthorized use of his credit card.

IV. CONCLUSION

Bryan should be informed that he is responsible for payment of the $1,850 van repair and all gasoline, grocery, and book charges because of the actual and/or apparent authority he created in his father, Henry. However, Bryan created no actual or apparent authority regarding the $1,200 charge at Franklin Hardware Store for the power tools, which was therefore an “unauthorized use.” At most, Bryan will be responsible for $50 of the $1,200 charge.

A particularly astute examinee might advise Bryan to get the purchase price of the power tools refunded to his credit card. In addition, one might advise Bryan to pay for the tools even if not legally obligated and work out repayment with his father. This would avoid any potential claim against his father and seems in line with Bryan’s expressed desire to support his father in difficult times. (Examinees were not asked to research or address potential liability Henry might have to Bryan for these purchases.)

July 2015 MPT:

In re Franklin Aces

File

Franklin Arts Law Services
Pro Bono Legal Services for the Franklin Arts Community
224 Beckett Avenue
Franklin City, Franklin 33221

MEMORANDUM

TO: Examinee
FROM: Eileen Lee, Esq., Executive Director
RE: Al Gurvin
DATE: July 28, 2015

We have agreed to offer legal advice to Al Gurvin concerning a claim he may have against the Franklin Aces professional football team. The relevant materials are attached.

Our engagement by Mr. Gurvin recognizes that, as a pro bono service, we do not have the resources to represent him in litigation. Rather, we have been retained solely to provide legal advice about his potential claim. If he decides to pursue litigation, we will help him find counsel.

Mr. Gurvin has asked for 1) our evaluation of the likelihood of success should he litigate his claim against the team, 2) our assistance in seeking a settlement (we have done so and received an offer), and 3) our recommendation as to whether he should litigate or accept the settlement offer that the team has made.

Please draft a letter to Mr. Gurvin providing your recommendation as to whether he should accept the settlement offer. Your recommendation should factor in your assessment of the likely outcome of litigation, the recovery he might realize should he prevail, his goals in pressing his claim, and any other factors you think relevant. You should fully explain your reasoning as to why he should accept or reject the settlement offer.

Do not separately state the facts, but include the relevant facts in support of your legal analysis and recommendation as to the settlement offer. Remember that Mr. Gurvin is not an attorney. Your letter should explain the law and recommendation in language that, while encompassing a full legal analysis including citations to relevant legal authority, does so in terms a nonlawyer may easily understand.

FRANKLIN SPORTS GAZETTE

REJOICE, FRANKLIN FOOTBALL FANS, THE ACES ARE COMING!

By Ben Jordan January 27, 2014

FRANKLIN CITY, Franklin—Franklin's long and unrequited longing for professional football is about to be satisfied. The Olympia Torches, after years of unsuccessful attempts to get support for a new stadium in Olympia, have announced that, starting in July of 2016, they will relocate to Franklin City.

ProBall Inc., the team owner, says that years of declining attendance in our neighboring state of Olympia—a result (in its view) of an aging, one could even say decrepit, stadium—have made a move imperative. Although many cities around the country sought to win the team, the owner chose Franklin City for several reasons, including the proximity of a good portion of the team's fan base (without a team of their own, many Franklin residents followed the Torches) and—probably more importantly—the financial support of the Franklin State and Franklin City governments to underwrite the construction of a new, state-of-the-art stadium.

That new stadium will be built in the existing Franklin City Sports Complex, run by the Franklin Sports Authority. The Sports Complex currently includes the Omnidome, where Franklin's pro basketball and hockey teams play, and Franklin Memorial Stadium, where the baseball Blue Sox play. The new stadium will be configured for soccer as well as football.

The team has also announced that it will change its name to the Franklin Aces. The new team logo and uniforms, yet to be created, will be announced in due course according to the team owner.

Transcript of Interview between Eileen Lee and Al Gurvin (June 29, 2015)

Lee: Mr. Gurvin, nice to meet you. How may we help you?

Gurvin: They've stolen my design for the new football team's logo, and I need a lawyer.

Lee: Perhaps we'd better start at the beginning. I've read your intake application, and I know you qualify for our pro bono services given your income level, but tell me about yourself and how all this got started, from the beginning.

Gurvin: Okay, sorry, let's see. I work as a janitor at the Franklin Omnidome, the hockey rink and basketball facility used by our pro teams. I got real excited last year when they announced that the Olympia pro football team was moving to Franklin City.

Lee: Why were you so excited? Are you a big football fan?

Gurvin: I'll say—more than a big fan. I'm nuts about football, and I've been rooting for the Torches for years and years. I watch every game on TV, and I'd give my eyeteeth to be able to afford tickets to see games in person.

Lee: What happened after you saw the news reports of the move?

Gurvin: Well, I'm an amateur artist—no real training, but I like to doodle. When they announced that the team was moving, they also announced that it was changing its name to the Franklin Aces. They also said that they didn't yet have a logo or uniform designs. I didn't give it a second thought. But several months later, I started to think about a design and then one day it hit me. I realized that a real good design for a logo would be a hand holding the four aces from a deck of cards, fanned out like you hold cards. So I sketched that design, and it looked pretty good. I showed the sketch to my boss, and he liked it too.

Lee: Who's your boss? What's his position?

Gurvin: Dick Kessler—he's the work crew supervisor at the Omnidome. Anyway, he suggested that I send it to Daniel Luce, the CEO of the Franklin Sports Authority. So I took a drawing of the logo and faxed it to Mr. Luce with a note.

Lee: When did that happen, and what did the note say? Do you have a copy?

Gurvin: It was 10 months ago. Here's a copy of the note, and my original sketch [see attached note and description].

Lee: What happened then?

Gurvin: Nothing—I never heard back from anyone. Then, about a month ago, the team made a big announcement with a press conference and everything at which they announced the new uniforms and logo, and it was mine, exactly! Here's a copy of their logo and the press release they issued with it, which was in the local newspapers [see attached press release and logo description]. I think they stole it from me, and I should be entitled to something for it—they should pay me something like $20,000.

Lee: Have you registered the copyright in your design with the United States Copyright Office?

Gurvin: No—should I?

Lee: Well, a copyright exists from the moment a work is created, and you don't need any government action to grant it. But registration with the Copyright Office is a good idea for many reasons—for example, for our purposes, should you decide to litigate, you must have registered your claim before you can take the case to court. Even though the infringement you allege has already occurred, you can still register, but let's see what route you wish to pursue. Registration isn't expensive, and it won't hurt to wait to register for a few weeks in any event. Let me look into it. I happen to know José Alvarez, the General Counsel of ProBall Inc., the team owner—he's an old classmate and friend of mine. I'll contact him to see if we can work something out short of litigation, and get back to you.

Gurvin: Okay, great.

Lee: You should understand, Mr. Gurvin, that, while we'll be happy to evaluate your claim and help you seek a quick settlement, we're in no position to represent you if you decide to litigate it. As a pro bono service, we simply don't have the resources to undertake litigation on behalf of any client. So if litigation is ultimately the route you wish to follow, we'll try to help you find counsel, but our representation of you must end at that point.

Gurvin: Sure.

Lee: We'll draft an engagement letter for you to sign. I hope we can help you resolve this.

Copy of Fax from Al Gurvin to Daniel Luce (September 25, 2014)

Dear Mr. Luce: I'm a janitor in the Omnidome, and a big, big football fan. When I read that the Torches were moving to Franklin City, and that the team would become the Aces, I had a great idea for a logo for the team. I made a sketch, and it's attached to this note. I'd be honored if the team would consider and use my logo, and I wouldn't want anything from them if they did, except maybe some tickets to games in the new stadium. Thanks, Al Gurvin

[Actual sketch omitted]

* * *

[DESCRIPTION OF GURVIN SKETCH: Mr. Gurvin's sketch consists of an outline of a hand from the wrist up, without any other features, holding four cards fanned out, in order from left to right, the ace of diamonds, ace of clubs, ace of hearts, and ace of spades.]

Press Release Announcing New Franklin Aces Logo

[Franklin City, May 28, 2015] The Franklin Aces football team is delighted to announce its new logo and uniforms. After consideration of many designs, we believe this one will be most appealing to the fans and players. Later this year we will begin discussions with various merchandise manufacturers, and we expect that our fans will be able to purchase their Franklin Aces gear next year.

[Picture of Franklin Aces logo omitted.]

* * *

[DESCRIPTION OF NEW FRANKLIN ACES LOGO:

Although the outline of the hand is somewhat different, the Franklin Aces logo presented in the press release is otherwise identical to Mr. Gurvin's sketch.]

ProBall Inc.

José Alvarez, General Counsel
Franklin City Sports Complex, Suite 520
Franklin City, FR 33221

July 24, 2015

Eileen Lee, Esq.
Franklin Arts Law Services
224 Beckett Avenue
Franklin City, FR 33221

Dear Eileen:

Thanks for your phone call of July 7, 2015, explaining Mr. Gurvin's claim. I've looked into the matter, and our conclusion is that your client has no basis for any claim against the team.

First, the design he created, whatever its merits, is not copyrightable subject matter. The images of playing cards are familiar designs and common property containing no original authorship. That being the case, any claim he might have must fail.

Second, even if the design were copyrightable, there is no proof that those who designed the new team logo had any access to it. Thus, even if the designs were identical, there could be no copyright infringement, for without proof of access, any claim must fail. To that end, I have attached affidavits from those involved that summarize testimony that would be given in court.

Even though your client has no basis for any claim, the team's owner, in an effort to avoid unhappy publicity, makes this offer: In return for a release of any claims based on your client's design, ProBall Inc. would give Mr. Gurvin a season ticket for a single seat, in a prime location, to all home games for the team's first season. (The retail price of such a season ticket will be $5,000.) Eileen, we go back a long way, you know I'm good for my word, and I want to be forthright with you—this is the team's final, and only, settlement offer.

With kindest personal regards,

José Alvarez

José Alvarez

AFFIDAVIT OF DANIEL LUCE

STATE OF FRANKLIN)
COUNTY OF LINCOLN)

I, Daniel Luce, being duly sworn, depose and say:

1. I am Chief Executive Officer of the Franklin Sports Authority. The Authority is entirely separate from ProBall Inc., the owner of the Franklin Aces football team. The Authority and ProBall Inc. are not under common ownership or affiliated in any way.

2. On September 25, 2014, I received a two-page fax from Al Gurvin, a janitor at the Omnidome facility of the Franklin City Sports Complex. I do not have a copy of the fax, but I know when I received it because I checked the fax log in our office. Although I do not recall the specifics, I remember that the fax had a sketch attached to it, and that Mr. Gurvin wanted the sketch submitted as a possible logo for the Franklin Aces pro football team.

3. I knew that the team had retained ForwardDesigns, a commercial design firm, to design a logo and uniforms for the team. Hence, I did not think any input from the Authority or otherwise was needed. Although I do not remember specifically what I did with the fax, I believe I discarded it in the trash.

4. ProBall was given a suite of offices in the five-story Administrative Building of the Franklin City Sports Complex. Those offices are on the fifth floor. All the Authority's offices, including mine, are on the second floor, as is the fax machine which serves all of the Authority's departments. (The ground floor contains a museum and ticket offices; the third and fourth floors are occupied by the firms holding the parking and food concessions at our facilities.)

5. Other than occasional greetings while passing in the lobby of our building or sharing rides in the elevator, I have had no contact with anyone working for ForwardDesigns.

6. I and some of my staff meet occasionally with executives of ProBall Inc. to coordinate details concerning the construction and operation of the new football stadium. Other than that, no one from the Franklin Sports Authority has any dealings with representatives of ProBall Inc., the team owner.

Dated July 22, 2015

Daniel Luce

Daniel Luce

Signed before me on this 22nd day of July, 2015

Jane Mirren

Jane Mirren
Notary Public

AFFIDAVIT OF MONICA DEAN

STATE OF FRANKLIN)
COUNTY OF LINCOLN)

I, Monica Dean, being duly sworn, depose and say:

1. I am a commercial artist and designer for ForwardDesigns. Our firm was retained in August of 2014 by ProBall Inc. to design a logo and uniforms for the Franklin Aces pro football team. I was the sole designer working on the project. Our firm was paid $10,000 for its services.

2. To facilitate my work on the project, the team gave me an office located in their suite of offices on the fifth floor of the Administrative Building of the Franklin City Sports Complex. I have had no contact with employees of the Franklin Sports Authority, other than with Julie Covington, a personal friend who works in the Authority's transportation office and with whom I occasionally have lunch. I have never met Daniel Luce, the Authority's Chief Executive Officer.

3. As I thought about a logo for the team, one obvious choice was a hand holding the four aces from a deck of cards. I had seen many versions of that image, including many on clip art collections on the Internet, none of which were protected by copyright, and which I used for inspiration. About five months ago, I drew that design, along with about a dozen others, and submitted it to ProBall Inc., who chose it as the new team logo. I alternated the suits of the cards in the design so that they appeared as first a red suit, then a black suit, and I made the last and most visible card the ace of spades, as it is the most striking and familiar card.

4. I do not recall ever seeing any sketch of any idea for the logo created by anyone else prior to creating my design.

Dated July 22, 2015

Monica Dean
Monica Dean

Signed before me on this 22nd day of July, 2015

Jane Mirren
Jane Mirren
Notary Public

July 2015 MPT:
In re Franklin Aces

Library

Oakland Arrows Soccer Club, Inc. v. Cordova
United States District Court for the District of Columbia (1998)

The question of the boundary between copyrightable and noncopyrightable subject matter—that is, what types of works are protected by the Copyright Act, and what types of works fall outside its sphere of protection—arises in the context of this petition for a writ of mandamus against Ricardo Cordova, the Register of Copyrights. All such actions against the Register of Copyrights must be brought here in Washington, D.C., as it is the location of the Copyright Office.

The facts are simple and not in dispute: The Oakland Arrows professional soccer club developed a new logo and wished to register it with the United States Copyright Office. While registration is entirely permissive, 17 U.S.C. § 408(a), and the existence of a copyright does not depend on it, registration confers significant benefits to the copyright owner, not the least of which is that it is a prerequisite to bringing a suit for copyright infringement. 17 U.S.C. § 411.

The Arrows' new logo consisted of an oblique triangle, colored red, white, and blue. The Arrows' explanation for the design was threefold: 1) the triangle conjured up an image of an arrowhead; 2) the triangle could be seen to be a stylized letter "A"; 3) the colors evoked the United States flag.

The Arrows submitted an application for copyright registration to the Copyright Office. The Office's procedure is to examine each work for which registration is sought and determine if the work qualifies, in its opinion, for copyright protection. In this case, the Office's examiner concluded that the work did not qualify for protection. There is an internal appeals mechanism within the Office, which the Arrows pursued, but without success. Hence, they bring this mandamus action, seeking to compel the Register of Copyrights to register the work.

We review the question de novo. While we do give deference to the decision of an expert administrative agency, that deference is not necessarily dispositive.

The standard for copyrightability is easily stated: copyright protects original works of authorship. 17 U.S.C. § 102. That standard, however, is not so easily applied. What constitutes authorship? What constitutes originality? The courts have wrestled with these questions over the years. Justice Holmes, in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903), stated that "[It] is the personal reaction of an individual upon nature . . . . [A] very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright . . ." More recently, Justice O'Connor, in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 345 (1991), stated (internal references and quotations omitted):

> Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity . . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works will make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it may be.

How do we apply these tests to the work at hand? We are assisted, to some degree, by the regulations of the Copyright Office as to the types of works the Office will register. We quote the regulation—which the Office states is based on decades of court decisions—in full, from 37 C.F.R.:

> **§ 202.1 Material not subject to copyright.**
>
> The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:
>
> (a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents;
>
> (b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing;
>
> (c) Blank forms, such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information;
>
> (d) Works consisting entirely of information that is common property containing no original authorship, such as, for example: Standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists or tables taken from public documents or other common sources;
>
> (e) Typeface as typeface.

The Copyright Office, in defending its action, argues that the logo is simply a "familiar symbol or design," with a "mere variation in coloring," as in subsection (a) of the regulation. While the Arrows make many arguments as to the artistic value of the work, the effort that went into creating it, and the connections to the team which it conjures up, none of those arguments can carry the day. The copyright law does not reward effort—it rewards original expression of authorship. What we have here is a simple multicolored triangle. That is a "familiar symbol," with "mere variation of coloring." There is not enough originality of authorship in that design to merit copyright protection. In Justice O'Connor's words, even the "extremely low" "minimal degree of creativity"—the "creative spark"—is lacking here.

The Arrows' petition for a writ of mandamus is denied.

Savia v. Malcolm

United States District Court for the District of Franklin (2003)

In this action for copyright infringement, plaintiff Joseph Savia, the composer and copyright owner of the song "Perhaps," claims that defendant Lauren Malcolm copied the melody of his song and used it in her song "Love Tears" without authorization. After extensive discovery, the parties have filed cross-motions for summary judgment. We deny the plaintiff's motion and grant the defendant's motion.

Facts

In 1981, Savia wrote "Perhaps" and was successful in having it placed over the closing credits of the motion picture *The Duchess of Broken Hearts*. The motion picture had only a limited theatrical release, playing in a single "art house" movie theater in Franklin City for a three-week run. A dispute among the producers of the motion picture, for reasons not relevant here, has resulted in no further exploitation of the motion picture, either in theatrical release, in home video format, or on television, cable, the Internet, or otherwise. The motion picture was rated NC-17 by the Motion Picture Association of America because of its sexual content. That rating means that no one under the age of 17 will be admitted to a theater showing the motion picture. "Perhaps" was never commercially recorded, other than for the soundtrack of the motion picture, and no recording of it has ever been released. Savia registered the work with the United States Copyright Office, and there is no dispute about the validity of the copyright in "Perhaps" or that he is the copyright owner.

In 2002, Malcolm, a lifelong resident of Franklin City and a highly successful 25-year-old songwriter, wrote "Love Tears," which was commercially recorded and released by Remnants of Emily, a well-known rock band. The recording achieved great success, ultimately making number one on the *Billboard* "Hot 100" chart for four weeks. The recording has sold over two million copies, and the song has been widely performed and has been used in commercial advertisements. Malcolm, as songwriter, has, through the end of 2002, earned approximately $1.5 million in royalties attributable to the song from these various uses.

The parties each presented expert testimony from musicologists. These expert witnesses agreed, and the court as finder of fact also finds, that the lyrics of the songs are entirely different, but that the melodies are, if not identical, virtually so.

<u>The Standard for Infringement</u>

It is rare that direct evidence of copyright infringement exists. Therefore, the courts have turned to circumstantial evidence in determining whether one work infringes another. In doing so, the courts in this Circuit have uniformly applied a two-prong test for infringement: 1) Are the works "substantially similar"? 2) Did the alleged infringer have access to the copyrighted work? The reasons for these two standards should be obvious: If the works are not, at the very least, substantially similar, there can be no infringement. And if the alleged infringer had no access to the allegedly infringed work, there could be no possibility of copying. Certainly, the more similar the works, the less evidence of access need be adduced. But plausible evidence of access must always be found.

Two cases are instructive. In *Fred Fisher, Inc. v. Dillingham*, 298 F. 145 (S.D.N.Y. 1924), the legendary songwriter Jerome Kern was accused of plagiarizing the bass line from a wildly popular earlier work. Although Kern testified that he did not consciously use the earlier work, the court concluded that Kern, a working songwriter who kept up with current popular music, must have heard it and so had access to it. Kern also argued that the bass line could be found in earlier works which were not protected by copyright; if he had copied from those works, he would not be infringing. But, as Kern could not prove that he was even aware of those works before the lawsuit, his argument failed, and he was found liable for infringement.

In *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom ABKCO Music Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983), George Harrison (of the Beatles) was accused of plagiarizing the melody of an earlier popular rock and roll song. He testified that he did not consciously copy the earlier song, and the court believed him. Nevertheless, the court concluded that he had access to the earlier song and so had "unconsciously" copied it; he was found liable for infringement.

<u>Analysis</u>

Here, there is no question that the works are virtually identical. Substantial similarity—

indeed, striking similarity—of the melodies is proven. The question is whether Malcolm had access to Savia's song. Can access be plausibly inferred from the evidence? We conclude that it cannot.

As noted, Savia's song was released to the public only in the form of the closing credits of a motion picture, one that had only a limited run in Franklin City. Further, the motion picture had been rated NC-17, meaning that no one under the age of 17 would be admitted to the theater. At the time the motion picture was released, Malcolm was four years old. While we can take judicial notice of the fact that the ratings code is sometimes more honored in the breach than in the observance, we think it implausible that a four-year-old child would be admitted to a theater showing an NC-17–rated movie.

Savia argues that, even so, Malcolm might have had access to "Perhaps" by hearing someone who had seen the motion picture play or sing the song. Without a scintilla of evidence to justify that conclusion, we cannot credit such mere speculation.

Conclusion

We conclude that there is no plausible evidence that Malcolm had access to Savia's work. For that reason, notwithstanding the virtual identity of the melodies of the two songs, we conclude that Malcolm's song was original with her and was not copied from Savia's. We deny Savia's motion for summary judgment and grant Malcolm's motion for summary judgment.

Herman v. Nova, Inc.
United States District Court for the District of Franklin (2009)

In our previous opinion, [citation omitted], Nova, Inc., a motion picture producer, was found liable to Herman for copyright infringement of Herman's unpublished screenplay. We now address the question of damages.

Herman, an amateur author, had, unsolicited, submitted the screenplay to Nova. Nova then used the screenplay as the basis for its own screenplay, from which, it announced, it was going to make a motion picture. It issued a press release announcing its intention to make a motion picture based on its own screenplay; the press release included a synopsis of the screenplay. Herman saw the press release and, before Nova took any further action, successfully sued Nova for copyright infringement.

Because Herman had not registered his copyright in his unpublished screenplay with the United States Copyright Office before the act of infringement occurred, his damages are limited to his actual damages and the infringer's profits. 17 U.S.C. §§ 412, 504(b). Had Herman registered before the infringement, he would have been entitled to statutory damages in lieu of actual damages and profits, and, in the court's discretion, costs, including attorney's fees. Here, as Nova, the infringer, took no action after appropriating Herman's work and realized no gain, direct or indirect, thereafter, there are no profits resulting from the infringement which can be awarded. (The result would be different if, for example, the motion picture had been made and released, but such is not the case here.) The question, then, is what are Herman's actual damages?

As Herman was an amateur author, he had no track record of payments for his work and hence can submit no evidence of his own as to his screenplay's worth. The evidence adduced in discovery, from Nova's records and from third-party witnesses, shows that the range of payment which a motion picture producer like Nova would make for a screenplay of this sort would be between $15,000 and $50,000.

Given the unquestioned infringement that took place, we are disposed to award damages at the upper end of that range. Hence, judgment will be entered in Herman's favor for $50,000.

July 2015
MPT-2 Point Sheet:
In re Franklin Aces

This July 2015 MPT Point Sheet was provided to bar examiners to assist in grading the examination. It addresses the factual and legal points encompassed within the MPT. While it is illustrative of the discussions that might have appeared in excellent responses constructed by examinees, it is more detailed than examinee responses were expected to be.

In re Franklin Aces

DRAFTERS' POINT SHEET

In this performance test, the examinee is employed in the office of Franklin Arts Law Services (FALS), a pro bono provider of legal services for the Franklin arts community. FALS has agreed to provide legal advice to Al Gurvin concerning a claim he may have against ProBall Inc., the owner of the Franklin Aces football team, for copyright infringement resulting from unauthorized use of his design for a team logo.

Mr. Gurvin has asked FALS 1) to evaluate the likelihood of success should he litigate his claim against the team; 2) to assist in seeking a settlement short of litigation (which has been done, resulting in a settlement offer); and 3) to recommend whether he should litigate or accept the settlement offer.

An important aspect of the matter is that FALS is not in a position to represent Mr. Gurvin should he decide to litigate his claim. Hence, FALS and Mr. Gurvin have explicitly agreed that FALS's services will be limited to the above three items, and, should he decide to litigate, FALS will assist in attempting to find litigation counsel for him. Because FALS will not be litigating any claim on Mr. Gurvin's behalf, its assessment of the merits of his claim and recommendation whether or not to settle can be as objective as possible.

The examinee is asked to draft a letter to Mr. Gurvin analyzing his chances of success should he litigate his claim and recommending whether he should litigate or accept the settlement offer. The examinee is given factors to consider in making the recommendation.

Finally, the examinee is cautioned that, as Mr. Gurvin is not an attorney, the draft letter should explain the law and recommendation as to settlement fully, but in language that a non-lawyer can understand.

The File contains 1) the instructional memorandum; 2) an article from the *Franklin Sports Gazette* concerning the relocation of the Olympia Torches football team to Franklin City and the renaming of the team as the Franklin Aces; 3) a transcript of Mr. Gurvin's interview by Eileen Lee, FALS's Executive Director; 4) a copy of the fax and a description of the sketch sent by Mr. Gurvin to Daniel Luce, the Chief Executive Officer of the Franklin Sports Authority, as well as a description of the logo chosen by the team and the team's press release announcing its new logo; 5) a letter from José Alvarez, the team's General Counsel, in response to a telephone call from Ms. Lee, denying liability and making a final settlement offer; 6) an affidavit from Daniel Luce, the CEO of the Franklin Sports Authority; and 7) an affidavit from Monica Dean, the designer of the logo ultimately used by the team. The Library contains 1) *Oakland Arrows Soccer Club, Inc. v. Cordova*, a 1998 District of Columbia federal district court mandamus action; 2) *Savia v. Malcolm*, a 2003 Franklin federal district court case; and 3) *Herman v. Nova, Inc.*, a 2009 Franklin federal district court case.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

The examinee must, first, master the facts as revealed by the items in the File; second, master the law as set forth by the cases; third, analyze the chances of Mr. Gurvin's success in litigation based on the application of the law to the facts; fourth, make a recommendation to Mr. Gurvin as to whether he should accept the settlement offer based on the factors given in Ms. Lee's memorandum; and fifth, explain to Mr. Gurvin the legal analysis and the basis for the recommendation as to settlement in language a nonlawyer can understand.

The examinee should address two issues in his or her legal analysis:

1) <u>Is Mr. Gurvin's design copyrightable?</u> Does it contain the requisite originality of expression to qualify as copyrightable subject matter?

2) <u>Is there sufficient evidence that the team owner, ProBall Inc., or Monica Dean, the designer the team employed, had access to Mr. Gurvin's design?</u> Given that evidence of access is of necessity circumstantial, do the facts support such a conclusion?

Based on the examinee's conclusions as to these issues, he or she must then advise Mr. Gurvin as to the likelihood that he would succeed in litigation. Based on that conclusion, the other facts in the record, and the recovery Mr. Gurvin would receive if he were successful in litigation based on the statute and case law, the examinee must then recommend acceptance or rejection of the settlement offer.

II. DISCUSSION

A. Facts

The article from the *Franklin Sports Gazette* of January 27, 2014, establishes that the Olympia Torches professional football team will relocate to Franklin City, that the state and city governments are building a new stadium for the team in the Franklin City Sports Complex, run by the Franklin Sports Authority, and that the team will change its name to the Franklin Aces. The article also notes that the team's new logo will be announced at some point in the future.

The transcript of Ms. Lee's interview of Mr. Gurvin of June 29, 2015, establishes that he is a rabid football fan of the Olympia Torches. He is a janitor at the Franklin Omnidome (part of the Franklin City Sports Complex) and a self-described "amateur artist." He was really excited to learn that the team was moving to Franklin and would be called the Aces. Several months later, an idea for a team logo came to him and he drew a sketch of a hand holding four playing card aces fanned out and showed it to his supervisor. His supervisor suggested that he fax it to the CEO of the Franklin Sports Authority, which he did with a covering note. He received no response. When the team announced its new logo in May of 2015, it was virtually identical to his sketch. Mr. Gurvin has not registered his design in the United States Copyright Office. The interview also establishes that he would dearly like to attend pro football games in person and would "give [his] eyeteeth" to do so but cannot afford it.

Mr. Gurvin's note faxed to the CEO of the Franklin Sports Authority stated that he expected no remuneration should the team use his logo, except "maybe some tickets to games in the new stadium." After the team disclosed its logo design, Mr. Gurvin (in his interview with Ms. Lee) said he now wanted $20,000 from the team.

The descriptions of Mr. Gurvin's design and the logo announced by the team indicate that they are indeed virtually identical.

The team's press release announcing the new logo, issued May 28, 2015, states that merchandise bearing the logo will not be available until sometime in 2016. Hence, at the time Mr. Gurvin is making his claim, the team has realized no revenue attributable to the new logo.

Mr. Alvarez's response of July 24, 2015, to a telephone call from Ms. Lee in which she set forth Mr. Gurvin's claim denies any liability because, in the team's opinion, 1) Mr. Gurvin's design is not copyrightable and 2) neither anyone at the team nor the logo designer the team employed had access to Mr. Gurvin's design. The letter contains a "final, and only, settlement offer" of one season ticket to the team's first season, worth $5,000.

The affidavit of Daniel Luce, CEO of the Franklin Sports Authority, acknowledges receipt of Mr. Gurvin's fax but states that Luce believes he discarded it in the trash, and implies that he did not show it to anyone at the team. His affidavit states that the team and the Authority are entirely separate entities; that he has had no contact with anyone working for ForwardDesigns, the firm hired by the team to design the new logo; that, while he and his staff have occasional operational meetings with representatives of the team, they have no other contact with them; and that, while the Authority and the team have offices in the same building, they are on different floors.

Monica Dean's affidavit establishes that in August of 2014—one month before Mr. Gurvin sent his fax—the team engaged her firm to design the new logo, for a fee of $10,000, and that she was the sole designer working on the project. Other than an occasional lunch with a personal friend who works in the Authority's transportation department, she had no contact with anyone at the Authority. She has never met Mr. Luce, the Authority's CEO. The logo chosen by the team was one of several she designed and was an "obvious choice" given the team's name. Her design was inspired by many versions of the image, none of which were protected by copyright. She has no recollection of ever seeing Mr. Gurvin's design.

B. Legal Analysis of Likelihood of Success in Litigation

Whether Mr. Gurvin can succeed in litigation depends on two questions: 1) Is his design copyrightable? The first case in the Library, *Oakland Arrows Soccer Club, Inc. v. Cordova*, addresses this question. 2) Even if it is, did the team and its designer have access to it? The second case in the Library, *Savia v. Malcolm*, addresses this question.

1. Whether Mr. Gurvin's Design Is Copyrightable Is a Close Call.

The examinee should start by noting that, as stated in *Oakland Arrows*, the standard for copyrightability—what constitutes protectable subject matter under the Copyright Act—is originality of authorship. There, the design for which protection was sought was a simple triangle in three colors. The Copyright Office rejected registration. Quoting a Supreme Court case, the court noted that, while the standard for copyrightability is minimal, there must nevertheless be some "creative spark." The court looked to the Copyright Office's regulation as to material not subject to copyright, based on prior court cases, and noted that "familiar symbols" and "mere variation of coloring" did not make a work copyrightable. The court upheld the Office's determination.

Applying that analysis to the case at hand, the examinee should note that the image of a hand holding playing cards in the form of four fanned-out aces is quite common and could reasonably be considered a "familiar symbol." Because the design is quite commonplace—as Ms. Dean's affidavit notes, there are many comparable images which are not protected by copyright—it could be found not to be copyrightable. But, because this design is more complex than that held not copyrightable in *Oakland Arrows*, there is also a reasonable possibility that it would be found to be copyrightable. Thus, the issue is not free from doubt, and whether Mr. Gurvin would prevail on this point is a toss-up.

2. Proving Access Would Be Difficult.

The examinee should start by noting that, even if Mr. Gurvin's design is copyrightable, there still must be plausible evidence that the designer or the team had access to it for Mr. Gurvin to prevail. As stated in *Savia*, it is rare that direct evidence of infringement is present, and hence circumstantial evidence must be adduced. To do so, two criteria must be met: 1) the works must, at the least, be "substantially similar"—a given in this case; and 2) there must be some proof that the alleged infringer had access to the allegedly infringed work.

Savia dealt with an allegedly infringing musical work. While the melodies of the two works were substantially similar, the proof of access was tenuous. The allegedly infringed work made its only appearance over the closing credits of a motion picture. The movie was rated NC-17, meaning that no one under age 17 would be admitted. The alleged infringer was only four years old when the movie had its very limited release, and it has not been shown in any medium since, nor has the song been recorded. Given this history, the court concluded that there was no reasonably plausible evidence of access; mere speculation would not suffice.

Applying that analysis to the case at hand, the examinee should note that

- Mr. Gurvin's sketch was faxed only to Mr. Luce, the CEO of the Franklin Sports Authority, which is an entirely separate entity from the team and from the design firm the team engaged.
- The offices of the Authority and the team and designer are on different floors of the same building.

- The contact between the Authority and the team and designer was limited, and Ms. Dean (the designer retained by the team) has never met Mr. Luce.

- Mr. Luce specifically recalls receiving the fax and thinking that there was no point in passing it on to the team, and believes that he discarded it in the trash.

- To prove access, Mr. Gurvin would have to speculate that the sketch somehow made its way from Mr. Luce or the trash to Ms. Dean, with no supporting evidence for that assertion. For example, Mr. Gurvin would have to allege 1) either that Mr. Luce gave the sketch to Ms. Covington, who works in the Authority's transportation department, or that she retrieved it from the trash, and 2) that Ms. Covington, a personal friend of Ms. Dean, the designer, gave it to her. Both these allegations are contradicted by the sworn statements of Mr. Luce and Ms. Dean.

- Ms. Dean has sworn that she was specifically inspired by other, similar designs which are not protected by copyright, rather than by Mr. Gurvin's design, which she swears she never saw.

In sum, from these facts, the examinee should conclude that it would be difficult to argue a salient case for access.

C. Mr. Gurvin Should Accept the Settlement Offer.

The examinee should make the following points in making his or her recommendation as to whether to accept the team's settlement offer:

- Given that, to prevail in litigation, Mr. Gurvin would have to succeed on *both* the copyrightability and access analyses, the examinee should reach the conclusion that Mr. Gurvin would have a difficult time winning—even if he prevailed on the issue of copyrightability, which is a toss-up, he would very likely not prevail in proving access.

- Mr. Gurvin had indicated in his fax to the CEO of the Franklin Sports Authority that he would allow the team to use his logo in exchange for tickets to games at the new stadium.

- Mr. Gurvin stated to Ms. Lee, the Executive Director of FALS, that he would "give [his] eyeteeth" to see a game in person.

- In accordance with *Herman v. Nova, Inc.*, even if Mr. Gurvin prevailed in litigation, given that he had not registered his copyright prior to the act of alleged infringement, he would be limited to his actual damages and the infringer's profits.

- Here, as no merchandise has been made or sold with the logo, there are no profits.

- The design firm's fee was $10,000, and, based on *Herman*, this is the maximum Mr. Gurvin could recover.

- The season ticket offered in settlement is worth $5,000.

- Given the $5,000 difference between the value of the settlement ($5,000) and the maximum recoverable damages ($10,000); the time, effort, and expense involved in litigation; and Mr. Gurvin's desired recovery of $20,000, the settlement offer is reasonable.

- Perceptive examinees may note that, as Mr. Gurvin would have to register his design with the Copyright Office before being able to litigate, there is even a likelihood that the Copyright Office would reject the registration (as was the case in *Oakland Arrows*) and thus foreclose any litigation, let alone any possibility of recovery by settlement.

- Perceptive examinees may also note that litigation does have costs, which of necessity must come out of any recovery Mr. Gurvin might realize. They may also note that, because he did not register his work with the Copyright Office before the alleged infringement occurred, he could not recover his attorney's fees. *Herman*.

- The examinee should therefore recommend acceptance of the settlement offer.

III. CONCLUSION

The examinee should, in straightforward language, 1) present the legal analysis of the questions of copyrightability and access, 2) conclude that there is little probability of success on the legal merits should the matter be litigated, and 3) recommend acceptance of the settlement offer and explain that recommendation.

February 2015 MPT:
In re Harrison

File

Barbour, Lopez & Whirley
Attorneys at Law
788 Washington Blvd.
Abbeville, Franklin 33017

M E M O R A N D U M

To: Examinee
From: Esther Barbour
Date: February 24, 2015
Re: Daniel Harrison matter

Last year, our client Daniel Harrison bought a 10-acre tract (the Tract) of land in the City of Abbeville from the federal government, which had used the property as an armory and vehicle storage facility. The Tract is currently zoned for single-family residential development. Harrison applied for a rezoning of the property for use as a truck-driving training facility, but the City has denied the application.

Harrison wants to know whether he can pursue an inverse condemnation case seeking compensation from the City based on the denial of his rezoning application. Inverse condemnation is a legal proceeding in which a private property owner seeks compensation from a governmental entity based on the governmental entity's use or regulation of the owner's property.

Please draft a memorandum to me identifying each of the inverse condemnation theories available under Franklin and federal law and analyzing whether Harrison might succeed against the City under each of those theories. Note that there has been no physical taking, so do not address that issue. Do not prepare a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis.

Barbour, Lopez & Whirley

MEMORANDUM TO FILE

From: Esther Barbour
Date: February 23, 2015
Re: Summary of interview of Daniel Harrison

Today I met with Daniel Harrison regarding a 10-acre Tract he bought from the federal government. He provided the following background information about the Tract's zoning, its prior use, and his plans for development.

- From 1978 to 2014, the Franklin National Guard operated an armory and vehicle storage building on the Tract. The buildings and parking lot are located on approximately three acres, and the remaining seven acres are undeveloped, heavily sloped, and wooded.

- In 1994, the City of Abbeville enacted an R–1 (single-family residential) zoning ordinance, restricting development to single-family housing and prohibiting all commercial and industrial uses on the Tract.

- The Guard operated the armory and storage building without objection from the City until March 2014, when the property was decommissioned and the Guard began looking for buyers. The buildings were (and still are) in good shape, but they contain levels of asbestos and lead paint that may pose environmental hazards if the buildings are renovated or demolished.

- The Tract borders a City park and baseball field and is near the municipal airport. The area surrounding the Tract has had very little residential growth since the 1960s.

- In June 2014, Harrison purchased the Tract from the Guard through a bid process for \$100,000 (about \$10,000 per acre), intending to use the existing Guard buildings for commercial purposes. He believed that the Tract was "grandfathered in" and not subject to the 1994 residential zoning ordinance.

- There were several other bids on the Tract, ranging from $20,000 to $88,800. Harrison anticipates that the City will point to his winning bid and the other bids submitted as proof of the Tract's value. However, the other bids were made before the City rejected Harrison's proposed non-residential use of the Tract, and Harrison believes that the other bidders bid on the Tract believing (as he did) that the zoning ordinance would not be enforced.

- Harrison also believes that it is not feasible to develop the Tract for residential use (see attached emails).

- In August 2014, Harrison negotiated a lease of the Tract to a truck-driving school. After negotiating the lease, Harrison contacted the City and was informed that the City intended to enforce the residential zoning ordinance.

- He then submitted an application to the City's Planning and Zoning Board requesting that the zoning of the Tract be changed from R–1 (single-family residential) to C–1 (general commercial/industrial) to allow the Tract to be used as a truck-driving school.

- The Board recommended approval of the rezoning application, but the Abbeville City Council voted unanimously to deny it.

- At the Council meeting, some Council members were concerned about the proximity of the Tract to a park; one suggested that with a special-use permit, the property could be used for a church, medical or dental clinic, business office, or day-care center. Harrison believes that these other uses are not feasible because the Tract is in a remote area of the City with little traffic and no growth, and because of the prohibitive cost of renovating the existing structures for such non-industrial uses.

- Harrison wants to keep the Tract, but he's very concerned about losing money on it. The Tract would be worth $200,000 if used for industrial purposes (see attached appraisal). But because the City denied his rezoning application, the Tract is not producing and will not produce any income. Harrison estimates that if the Tract is not rezoned, he will lose between $10,000 and $15,000 per year due to maintenance, taxes, insurance, and deterioration.

MASTER APPRAISALS LLP
3200 Barker Road
Abbeville, Franklin 33020

Mr. Daniel Harrison January 9, 2015
1829 Timber Forest Drive
Abbeville, Franklin 33027

SUBJECT: Market Value Appraisal for Harrison Tract

Dear Mr. Harrison:

Master Appraisals LLP submits the accompanying appraisal of the referenced property. The purpose of the appraisal is to develop an opinion of the market value of the fee simple interest in the property based on the highest and best use value of the property, if zoned for general commercial/industrial use. The appraisal is intended to conform to the Uniform Standards of Professional Appraisal Practice and applicable state appraisal regulations.

The subject is a parcel of improved land containing two buildings and a parking lot and consisting of an area of 10.0 acres or 435,600 square feet. The property is zoned R–1 (single-family residential) but has been used as a military armory and vehicle storage facility. The existing structures appear to be perfect for conversion to an industrial or training facility of some kind. That appears to be the highest and best use of the property, in its "as-improved" state. Thus, the appraisal assumes that the property will be used for industrial or training purposes.

VALUE CONCLUSION

Appraisal Premise: Market Value	**Date of Value:** January 6, 2015
Interest Appraised: Fee Simple	**Value Conclusion:** $200,000 total ($20,000/acre)

If you have any questions or comments regarding the information contained in this letter or the attached report, please contact the undersigned. Thank you for the opportunity to be of service.

Respectfully submitted,

MASTER APPRAISALS LLP

Margaret Jane Charleston

Margaret Jane Charleston
Certified General Real Estate Appraiser
Franklin Certificate # FR-053010

[Balance of APPRAISAL REPORT omitted]

January 19, 2015, Email Correspondence Between Harrison and Real Estate Agent

From: Daniel Harrison<dharr@cmail.com>
To: Amy Conner<amyc@abbevillerealty.com>
Subject: Development options for my land

Hi, Amy. Remember the 10-acre tract of land that I bought last year? I've been trying to get the tract rezoned as C-1 commercial so that I can lease it to a truck-driving school that wants to open a new training facility in Abbeville. The City Council denied my rezoning application and told me that the only development it will allow is single-family residential. Frankly, I just don't think anyone would want to live way down there. You've been a real estate agent for 15 years. What do you think?

From: Amy Conner<amyc@abbevillerealty.com>
To: Daniel Harrison<dharr@cmail.com>

I agree. I don't think the land is suitable for residential development. Assume that you could build three houses per acre—that would be 30 homes on the 10-acre tract. Typically, it costs between $15,000 and $20,000 per lot to develop land for single-family housing, including grading the land and installing utilities and drainage systems. That's a reasonable investment if the land is near a business district because people will pay a premium to live close to work.

But your land is almost 45 minutes southeast of the business district. There are several single-family lots a few miles from your tract, priced at $4,500 each, and they aren't selling. I think you'd be lucky to get $5,000 per lot if you developed the land, assuming you could sell the lots.

From: Daniel Harrison<dharr@cmail.com>
To: Amy Conner<amyc@abbevillerealty.com>

That's what I thought. I wasn't sure about the numbers, but I didn't think it was doable.... You've seen the tract — do you have any idea what it would cost to tear down the existing buildings and parking lot and clear the wooded areas of the tract?

From: Amy Conner<amyc@abbevillerealty.com>
To: Daniel Harrison<dharr@cmail.com>

In other deals I've worked on, I've seen it cost $25,000 or more to demolish a building or parking lot. Here, the property has two buildings with likely environmental issues, and a parking lot and shrubs and trees to remove. You're probably looking at a minimum expense of $75,000.

From: Daniel Harrison<dharr@cmail.com>
To: Amy Conner<amyc@abbevillerealty.com>

I just don't have that kind of money.... If I can't lease the land to the truck-driving school and I can't develop it for residential housing, what do you think it's worth in its current condition?

From: Amy Conner<amyc@abbevillerealty.com>
To: Daniel Harrison<dharr@cmail.com>

Not much. Maybe a few hundred dollars an acre. But that's about it.

February 2015 MPT:
In re Harrison

Library

Franklin Constitution, Article I, Section 13

No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . .

United States Constitution, Fifth Amendment (“Takings Clause”)

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Newpark Ltd. v. City of Plymouth
Franklin Court of Appeal (2007)

This appeal involves an inverse condemnation claim in which a developer (Newpark Ltd.) contends that the City of Plymouth's denial of its rezoning application effected an unconstitutional regulatory taking of property. We affirm the trial court's judgment against the developer.

The property at the center of this dispute consists of 93 acres of land acquired by Newpark for $930,000 ($10,000 per acre). The tract is located in an area zoned "SF–E" (single-family residential development). The area has been zoned for one-acre-minimum lots since 1967. The tract was used primarily for pastureland at the time of purchase. While Newpark was unaware that the tract was zoned for one-acre-minimum lots when it signed the purchase contract, it was aware of the zoning by the time of closing.

In August 2000, after closing on the tract, Newpark applied for a zoning change to allow the development of 325 single-family lots on the 93 acres with a density of approximately 3.5 units per acre. The City Council considered and denied the application. Newpark then sued the City, seeking damages for inverse condemnation.[1] The trial court found in favor of the City, and this appeal followed.

At the outset, we note that the fact that the zoning restriction had already been enacted when Newpark bought the tract does not bar it from bringing a takings action against the City, regardless of whether Newpark had notice of the restriction. Unreasonable zoning regulations do not become less so through the passage of time or title. *See Palazzolo v. Rhode Island,* 533 U.S. 606 (2001) (rejecting argument that post-zoning purchasers cannot challenge a regulation under the Takings Clause).

The Takings Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, prohibits the government from taking private property for public use

[1] Inverse condemnation occurs when the government takes private property for public use without paying the property owner, and the property owner sues the government to recover compensation for the taking. Because the property owner in such situations is the plaintiff, the action is called *inverse* condemnation because the order of the parties is reversed as compared to a direct condemnation action where the government is the plaintiff who sues a defendant landowner to take the owner's property.

without just compensation. *Id.* A taking can be physical (e.g., land seizure, continued possession of land after a lease to the government has expired, or deprivation of access to the property owner), or it can be a regulatory taking (where the regulation is so onerous that it makes the regulated property unusable by its owner). *See Soundpool Inv. v. Town of Avon* (Franklin Sup. Ct. 2003). The constitutionality of a regulatory taking involves the consideration of a number of factual issues, but whether a zoning ordinance is a compensable taking is a question of law.

The state of Franklin's prohibition against taking without just compensation is set forth in Article I, Section 13, of the Franklin Constitution and is comparable to the Takings Clause of the United States Constitution, despite minor differences in wording. *See Sheffield Dev. Co. v. City of Hill Heights* (Franklin Sup. Ct. 2006). Therefore, Franklin courts look to federal cases for guidance in these situations.

The United States Supreme Court recently clarified the types of regulatory taking: (1) a total regulatory taking, where the regulation deprives the property of all economic value; (2) a partial regulatory taking, where the challenged regulation goes "too far"; and (3) a land-use exaction, which occurs when governmental approval is conditioned upon a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development (e.g., a developer is required to rebuild a road but the improvements are not necessary to accommodate the additional traffic from the proposed development). *Lingle v. Chevron,* 544 U.S. 528 (2005).[2]

Here, Newpark does not argue that the City has physically taken its property, nor does it assert a partial regulatory taking or a land-use exaction. Thus, we need only consider the first type of regulatory taking: whether the City ordinance restricting development of Newpark's land to one-acre-minimum lots constitutes a total regulatory taking.

A total regulatory taking occurs when a property owner is called upon to sacrifice *all* economically beneficial uses in the name of

[2]The Franklin Supreme Court recognizes a fourth type of regulatory taking in situations where a regulation does not "substantially advance" a legitimate governmental interest. In *Lingle,* the United States Supreme Court rejected the "substantially advances" formula under federal constitutional law. Its continuing validity is still an issue under Franklin law, but the parties have not raised it. Thus, we need not determine whether the "substantially advances" test remains valid in a regulatory takings case under the Franklin state constitution.

the common good. This type of regulatory taking was first articulated by the United States Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). A *Lucas*-type total regulatory taking is limited to the extraordinary circumstance when no productive or economically beneficial use of the land is permitted and the owner is left with only a token interest.

Newpark contends that the only way to achieve an economically productive use of the property is for the City to allow single-family development of some type. This argument not only mischaracterizes the zoning ordinance but also misapplies the *Lucas* test upon which the argument is premised. The SF–E zoning *does* permit the development of a single-family residential subdivision, albeit in one-acre-minimum lots. The appraisal experts for both parties testified that, due to market conditions and the current zoning, the cost to develop one-acre lots would exceed the potential for revenue. The City's appraiser testified that the highest and best use of the property is to hold the property for the future.

Although the testimony established that the development would not be profitable under current conditions, the absence of profit potential does not equate with impossibility of development. To the contrary, the takings clause does not require the government to guarantee the profitability of every piece of land subject to its authority, although lost profits are a relevant factor to consider in assessing the value of property and the severity of the economic impact of rezoning on a landowner.

The City's expert testified that the property's value is approximately $5,000 per acre. Newpark's expert testified that the property is worth $2,000 per acre. Both experts testified that Newpark paid more for the property ($10,000 per acre) than it is worth. The court reasonably concluded that Newpark had assumed certain risks attendant to real estate investment. But such risks have no place in a total takings analysis because the government has no duty to underwrite the risk of developing and purchasing real estate. Although investment-backed expectations are relevant to a *partial* regulatory taking analysis rather than a total taking analysis, we note that when such expectations are measured, the historical uses of the property are critically important. Here, the zoning always required one-acre-minimum lots, and the historical use of the property was farmland.

Newpark's expert testified that the value of the property, if capable of being developed, is $25,000 per acre. Expert testimony on both sides provides a range of value for the property in an undeveloped state from $2,000 to $5,000 per acre. Newpark claims that the $2,000 constitutes no value at all.

We do not read *Lucas* to hold that the value of land is a function of whether it can be profitably developed. To the contrary, the economic viability test "entails a relatively simple analysis of whether value remains in the property after governmental action." *Sheffield.* The appropriate *Lucas* inquiry is whether the value of the property has been completely eliminated. The deprivation of value must be such that it is tantamount to depriving the owner of the land itself. *Id.*

Newpark also argues that the property is valueless because if it cannot be developed as a residential subdivision, it will remain vacant, with a value equivalent to that of parkland. The fallacy of this approach is that it equates the lack of availability of a property for its most economically valuable use with the condition of being "valueless." Although the regulation in *Lucas* precluded the development of oceanfront property, the property still had value. The owner could enjoy other attributes of the property: he could picnic, camp, or live on the land in a mobile trailer. The owner also retained other valuable property rights—the right to exclude others and to alienate the land. *Id.* (Blackmun, J., dissenting); *see also Wynn v. Drake* (Fr. Sup. Ct. 2003) (no taking when zoning left owner with only recreational and horticultural uses). Here, the court could reasonably conclude that the property retains residual uses and therefore some value.

Newpark's insistence that it is virtually impossible to find a tract of land without value is instructive. The fact that a piece of land will rarely be deemed utterly lacking in economic viability is consistent with the *Lucas* limitation of such claims to extraordinary circumstances. Here, because the property has a value of at least $2,000 per acre, we conclude that those extraordinary circumstances are not present. Because the ordinance does not completely eliminate the property's value, there has been no unconstitutional taking.[3]

Affirmed.

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[3] We note that a necessary result of a taking under these circumstances—had Newpark prevailed—would be that upon payment of adequate compensation, the City would own the property. Thus, had Newpark prevailed in its claim for inverse condemnation, Newpark would have been required to transfer title of the property to the City.

Venture Homes Ltd. v. City of Red Bluff

Franklin Court of Appeal (2010)

Appellant Venture Homes Ltd. owns two apartment buildings in the City of Red Bluff. After the City rezoned adjacent land, Venture sued the City, alleging that the rezoning had reduced the value of its property. The trial court granted the City's summary judgment motion. We affirm.

Background

In 1999, upon application of developer Austin Inc., the City created Planned Unit Development No. 12 (PUD 12). (A PUD is an alternative to traditional zoning containing a mix of residential, commercial, and public uses.) PUD 12 is a 195-acre mixed-use development, consisting of multi-family housing, shopping centers, and office buildings. The original development plan allowed a maximum of 900 apartment units to be built on the site. Austin built two apartment buildings, containing 800 units, which Venture subsequently purchased in 2002. Austin retained ownership of the remaining land in PUD 12.

When Venture bought the 800-unit apartment complex, it assumed that only 100 additional apartment units could be built in PUD 12. Because Venture thought that a 100-unit apartment building would be too small to be commercially viable, and because Venture believed that the City needed Venture's consent to allow additional apartment units in PUD 12, Venture assumed that it effectively had 100 additional units in reserve for future expansion of the two apartment buildings that it had purchased.

However, in April 2006, at Austin's request, the City carved out an area from PUD 12 and rezoned it. Austin then filed an application for creation of a new PUD within the boundaries of PUD 12. After public hearings, the City passed an ordinance creating PUD 30, an eight-acre tract zoned for 350 additional multi-family units.

Discussion

Venture alleges that creation of PUD 30 gives rise to a claim for inverse condemnation under the Franklin Constitution. Venture does not claim that its property was physically invaded or that the City's zoning regulations eliminated all economically beneficial uses of its property. Rather, Venture argues that the City's creation of PUD 30 amounted to a partial regulatory taking for which Venture should be compensated.

A. Partial Regulatory Takings Test

A partial regulatory taking may arise where there is not a complete taking, either physically or by regulation, but the regulation goes "too far," causing an unreasonable interference with the landowner's right to use and enjoy the property. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Because the Franklin Constitution's takings clause is similar to the Takings Clause of the Fifth Amendment to the United States Constitution, we look to federal law to analyze Venture's takings claims. *See Newpark Ltd. v. City of Plymouth* (Franklin Ct. App. 2007).

For a partial regulatory taking to occur, the governmental regulation must, at a minimum, diminish the value of an owner's property. Not every regulation that diminishes the value of property, however, is a taking.

There is no bright-line test for determining whether a partial, *Penn Central*–type regulatory taking has occurred. Whether a regulation goes "too far" requires a factual inquiry using the following guiding factors: (1) the economic impact of the regulation, (2) the extent to which the regulation interferes with the property owner's reasonable investment-backed expectations, and (3) the character of the governmental action. *Sheffield Dev. Co. v. City of Hill Heights* (Franklin Sup. Ct. 2006) (citing *Penn Central*).

Our goal is to determine, after analyzing and balancing all relevant evidence, whether a regulatory action is the functional equivalent of a classic taking in which the government directly appropriates private property, such that fairness and justice demand that the burden of the regulation be borne by the public rather than by the private landowner.

Our analysis must not be merely mathematical. Rather, while applying the balancing test, we must remember that purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite those risks.

(1) Economic Impact of the Regulation

The first *Penn Central* factor, the regulation's economic impact on the property owner, is undisputed for the purpose of this appeal. Venture presented expert testimony that the value of its apartment properties was reduced from $65.6 million to $62.9 million. The City stipulated to Venture's figure for purposes of this appeal. While significant in absolute terms, this diminution in value of $2.7 million reflects a loss of only about 4%.

The City cites several cases that suggest that such a small diminution in value is rarely if ever held to be a taking. The City claims that because Venture's loss was a small part of its property's value, Venture failed to show that creation of the new PUD unreasonably interfered with its use of the property. Although this one factor is not dispositive, the City is correct when it asserts that the small relative amount of Venture's loss weighs heavily against Venture's claims.

(2) Interference with Reasonable Investment-Backed Expectations

The second *Penn Central* factor requires us to consider the extent to which the regulation has interfered with Venture's reasonable investment-backed expectations. The record shows that the ordinance at issue caused minimal interference with Venture's *reasonable* investment-backed expectations.

Venture concedes that the only harm it has suffered is increased competition and a resulting diminution in the value of its property. The City has not rezoned Venture's property to prohibit a current or proposed use, nor has the City substantially altered the character of the surrounding land use. The City simply increased the number of multi-family units permitted within the original boundaries of PUD 12, which already included a significant number of multi-family units.

In *Sheffield*, the Franklin Supreme Court held that the existing and permitted uses of the property constitute the "primary expectation" of an affected landowner for purposes of determining whether a regulation interferes with the landowner's reasonable investment-backed expectations.

In creating PUD 30, the City has not altered the existing or permitted uses of Venture's property and therefore has not interfered with Venture's "primary expectation." Venture can continue to operate its 800-unit complex and can build an additional 100 units on its property, should it decide to do so.

(3) Character of the Governmental Action

The third *Penn Central* factor is the character of the governmental action. This factor is the least concrete and carries the least weight. This factor's purpose, when viewed in light of the goal of the takings test (to determine if the Constitution requires the burden of the regulation to be borne by the public or by the landowner) is to elicit consideration of whether a regulation disproportionately harms a particular property. If the rezoning was general in character, that weighs against the property owner, whereas if the rezoning impacted the owner's property disproportionately harshly, that weighs in the owner's favor that a taking did occur.

Venture asserts that the governmental action in this case targeted a small subsection of an otherwise cohesive PUD, thereby increasing competition for its apartment complex. Venture claims that the City created PUD 30 solely to satisfy Austin. The City disputes this and responds by citing language from the ordinance creating PUD 30 and public meeting minutes that suggest that the new PUD was crafted to "create a more modern pedestrian-friendly and urban environment."

The issue is whether the City created PUD 30 for the public welfare or did so to benefit the private interests of Austin. Venture presented evidence that could lead a reasonable fact finder to conclude that one of the City's purposes, or perhaps even its primary purpose, for enacting the ordinance was to benefit Austin. That evidence does not preclude summary judgment for the City, however, because the other two *Penn Central* factors—particularly the first (the economic impact of the regulation)—weigh so heavily against Venture that, as a matter of law, there is no taking here.

B. The "Substantial Advancement" Takings Test

Venture also argues that the City's ordinance creating PUD 30 effects a taking of its property because the ordinance does not "substantially advance legitimate state interests." The United States Supreme Court rejected this test in *Lingle v. Chevron,* 544 U.S. 528 (2005). Prior to *Lingle*, the Franklin Supreme Court applied the "substantial advancement" test to state regulatory-takings claims, but it has not yet addressed whether the test still applies in light of *Lingle*. Assuming that the test is still valid in Franklin, there was no taking under the "substantial advancement" test.

The "substantial advancement" test examines the nexus between the effect of the ordinance and the legitimate state interest it is supposed to advance. This requirement is not, however, equivalent to the "rational basis" standard applied to due process and equal protection claims. The standard requires that the ordinance "substantially advance" the legitimate state interest sought to be achieved rather than merely analyzing whether the government could rationally have decided that the measure achieved a legitimate objective.

The City asserts that the new PUD promotes a mixed-use, pedestrian-friendly, urban development that will enhance the quality of life of its citizens. Venture contends that the City's stated goal is a pretext—that its real goal was only to benefit Austin by making Austin's land more valuable. Even if that were true, however, we are not required to consider the City's *actual* purpose. Instead, we look for a nexus between the effect of the ordinance and the legitimate state interest it is *supposed* to advance. The City could reasonably have concluded that increasing housing density in a PUD already zoned for multi-family housing, shopping centers, and office space would advance the legitimate state interest of enhancing the quality of life of citizens by decreasing traffic, lowering commuting times, and encouraging citizens to walk. Accordingly, the creation of PUD 30 is not a taking under the "substantial advancement" test.

Affirmed.

February 2015 MPT:
In re Harrison

Point Sheet

This February 2015 MPT Point Sheet was provided to bar examiners to assist in grading the examination. It addresses the factual and legal points encompassed within the MPT. While it is illustrative of the discussions that might have appeared in excellent responses constructed by examinees, it is more detailed than examinee responses were expected to be.

In re Harrison

DRAFTERS' POINT SHEET

In this performance test, the client, Daniel Harrison, is seeking legal advice as to whether he can pursue an inverse condemnation action against the City of Abbeville based on the City's denial of his application to rezone a 10-acre tract of land (the Tract). The Tract is currently zoned R–1 for single-family residential development. The City has denied Harrison's application to rezone his property as C–1 (commercial/industrial) for use as a truck-driving school.

Harrison purchased the Tract for $100,000 (i.e., $10,000 per acre) in a government bid process. For more than 35 years, the Tract had been used as a National Guard armory and vehicle storage facility. At the time he purchased the Tract, Harrison believed it had been "grandfathered in" and was therefore not subject to the residential zoning ordinance, because the National Guard facilities pre-dated the City's adoption of the zoning ordinance in 1994 and the City had never objected to the ongoing use of the Tract by the National Guard.

Examinees' task is to draft an objective memorandum identifying each of the inverse condemnation theories available under Franklin and federal law and analyzing whether Harrison might succeed against the City under each of those theories. In doing so, examinees must determine whether the denial of Harrison's rezoning application constitutes a taking of his property under the federal and Franklin constitutions. This requires examinees to analyze the facts presented and apply a number of different "takings" tests to determine whether one of four potential regulatory takings claims can be asserted.

The File contains the instructional memo from the supervising attorney, a summary of the client interview, a recent appraisal, and emails between Harrison and a real estate agent. The Library contains the Franklin and federal constitutional "takings" clauses and two Franklin cases.

The following discussion covers all the points the drafters intended to raise in the problem.

I. Overview

No specific formatting guidelines are provided. However, examinees are instructed not to prepare a statement of facts but to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect their analyses.

II. Constitutional Provisions and Cases

The Franklin takings clause provides that "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . ." Article I, Section 13, Franklin Constitution.

- The Franklin takings clause is comparable to the federal takings clause of the Fifth Amendment to the U.S. Constitution, and therefore Franklin courts look to federal cases for guidance in such cases. *See Newpark Ltd. v. City of Plymouth* (Fr. Ct. App. 2007).
- Consequently, examinees should recognize that Harrison can assert claims under the Franklin and federal takings clauses and should engage in a consolidated analysis of both takings

clauses. (This point sheet treats the two clauses as interchangeable except where separate treatment is warranted.)

- Inverse condemnation occurs when property is taken for public use and the property owner attempts to recover compensation for the taking. *Newpark*. A regulation may, in some circumstances, constitute a taking requiring compensation. *Id.* There are three federally recognized types of regulatory takings: (1) a total regulatory taking, where the regulation deprives the property of all economic value; (2) a partial regulatory taking, where the challenged regu-lation goes "too far"; and (3) a land-use exaction, which occurs when governmental approval is conditioned upon a requirement that the property owner take some action that is not pro-portionate to the projected impact of the proposed development (e.g., a developer is required to rebuild a road but the road improvements are not necessary to accommodate the additional traffic generated by the proposed development). *Id.* (citing *Lingle v. Chevron,* 544 U.S. 528 (2005)).

- The Franklin Supreme Court recognizes a fourth type of regulatory taking in situations where a regulation does not "substantially advance" a legitimate governmental interest. However, in *Lingle,* the U.S. Supreme Court rejected the "substantially advances" takings test and held it inapplicable to *federal* inverse condemnation claims. *Id.* (fn. 2).

- Although the "substantially advances" test is no longer valid in the *federal* inverse condemnation context, it is unclear whether that test remains valid in a regulatory takings case under the Franklin state constitution because the Franklin Supreme Court has not had occasion to rule upon its validity. In *Newpark,* the Franklin Court of Appeal noted this uncertainty but did not discuss the issue further because the parties had not raised the issue. However, in *Venture Homes Ltd. v. City of Red Bluff* (Fr. Ct. App. 2010), the Franklin Court of Appeal applied the "substantially advances" test to the facts.

- Because of the uncertainty whether the "substantially advances" test remains valid under Franklin law, examinees should analyze whether denial of the rezoning application "substantially advances" a legitimate state interest under the *Venture* opinion.

III. Analysis

Examinees should begin by explaining that inverse condemnation is a legal proceed-ing in which a landowner seeks compensation from the government for the use or regulation of the owner's property, and then analyze whether Harrison can pursue the inverse condemnation theories against the City. Examinees are instructed that no physical taking has occurred and so they should not address it; their work product should focus only on the four regulatory takings claims—the three that apply under both federal and Franklin law, and the substantial advance-ment test that may apply under Franklin law. Examinees should also recognize that the fact that Harrison was aware that the Tract was zoned R–1 when he bought it at auction does not preclude any potential inverse condemnation claims. "Unreasonable zoning regulations do not become less so through the passage of time or title." *Newpark* (citing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001))

A. The Total Regulatory Takings Test

- A total regulatory taking occurs when a property owner is called upon to sacrifice *all* economically beneficial uses in the name of the common good. *Newpark* (citing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992)).

- A *Lucas*-type total regulatory taking is limited to the *extraordinary* circumstance when no productive or economically beneficial use of land is permitted and the landowner is left with only a token interest. The deprivation of value must be such that it is tantamount to depriving the owner of the land itself. *See Newpark.*

- In *Newpark,* the developer challenged a city's one-acre-minimum zoning ordinance. The court determined that no regulatory taking had occurred because the developer's property retained a value of $2,000 to $5,000 per acre (according to the competing experts' testimony). The court reasoned that although the developer had paid more for the property than it was currently worth, the developer had assumed certain risks attendant to real estate investment and it was not the government's duty to underwrite the risk of developing real estate or to guarantee a profit.

- The *Newpark* court rejected the developer's assertion that property is "valueless" if it cannot be developed for its most economically valuable use.

- Harrison is worried about losing money on the Tract; even in its idle state, taxes, maintenance, insurance, etc., cost between $10,000 and $15,000 per year. (*See* Client Interview.) These facts are relevant to a *partial* regulatory takings analysis (discussed below), which includes consideration of an owner's reasonable investment-backed expectations, but they have no bearing upon whether a *total* regulatory taking has occurred. Rather, the economic viability determination for a total regulatory taking "entails a relatively simple analysis of whether value remains in the property after governmental action." *Newpark* (quoting *Sheffield Dev. Co. v. City of Hill Heights* (Fr. Sup. Ct. 2006)).

- Therefore, in this part of their analyses, examinees should focus not on Harrison's investment potential, but on the Tract's *value* in its current residential-zoning-restricted condition. He paid $10,000 per acre for the Tract, and it is now worth only a few hundred dollars per acre in its current, idle state (per emails with real estate agent Amy Conner).

- Whether a value of a few hundred dollars an acre constitutes a "token" value is not a slam dunk; examinees may receive full credit regardless of their conclusions if their analyses are thorough and if they consider and apply the factors and requirements for total regulatory takings set forth in *Newpark.*

- Given that total regulatory takings are limited to *extraordinary* circumstances where the landowner is essentially deprived of the land itself, that in *Newpark* a residual value of $2,000 per acre was held to be more than "token," and that property will rarely be deemed utterly lacking in economic viability, examinees may conclude that a total regulatory taking has *not* occurred.

- Perceptive examinees may observe that while Harrison cannot lease the Tract to the truck-driving school, he nonetheless can enjoy the property's other attributes (e.g., he can picnic, camp, or live on the property in a mobile trailer), and he retains other valuable property rights (e.g., the right to exclude others and the right to alienate the land). These same attributes and rights persisted in *Newpark* and were cited by that court in support of the conclusion that a total regulatory taking had *not* occurred. *See also Wynn v. Drake* (Fr. Sup. Ct. 2003) (cited in *Newpark*), holding that no taking occurred when despite the zoning regulation, the owner could still enjoy the recreational and horticultural opportunities offered by the property.

- Examinees may also note that Harrison wants to keep the Tract, and that if he were to prevail on a total regulatory takings claim, ownership of the Tract would be transferred to the City. *Newpark* (fn. 3). This would be contrary to Harrison's expressed desire to keep the land. (See Client Interview.)

- Those examinees who conclude that a value of a few hundred dollars per acre is only a "token" value for which compensation is required may also receive credit if they apply the *Newpark* factors and distinguish *Newpark* and *Lucas*. Facts that support such a conclusion include the presence of lead and asbestos on the Tract's developed part and the dense woods and steep slopes on the undeveloped part. Arguably, there is very little use or enjoyment other than the use proposed by Harrison or a similar industrial use.

B. The Partial Regulatory Takings Test

- A partial regulatory taking may arise where there is not a complete taking, either physically or by regulation, but the regulation goes "too far," causing an unreasonable interference with the landowner's right to use and enjoy the property. *Venture* (citing *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978)). For a partial regulatory taking to occur, a governmental regulation must, at a minimum, diminish the value of an owner's property. Not every regulation that diminishes the value of property, however, is a taking. *Venture.*

- There is no formulaic test for determining whether a partial, *Penn Central*–type regulatory taking has occurred. Whether a regulation goes "too far" requires a factual inquiry that considers (1) the economic impact of the regulation, (2) the extent to which the regu-lation interferes with the property owner's reasonable investment-backed expectations, and (3) the character of the governmental action. *Sheffield,* cited in *Venture.*

- The ultimate issue is whether a regulatory action is the functional equivalent of a classic taking in which the government directly appropriates private property, such that fairness and justice demand that the burden of the regulation be borne by the public rather than by the private landowner.

<u>*Factor #1: Economic Impact of the Regulation*</u>

- In *Venture,* the plaintiff developer sued after the City rezoned adjacent land, which allowed another 350 housing units on that property, units that would compete with the plaintiff's apartment buildings. In analyzing the economic impact of the City's rezoning (which created a new "planned unit development" or PUD), the court focused on the diminution in value of the plaintiff's apartment properties that was attributable to the new development. Expert testimony suggested that the reduction in value was $2.7 million, which was significant in absolute terms. However, percentage-wise, the $2.7 million was equivalent to a drop in value of approximately 4%; the developer's property was still worth $62.9 million. Because the developer's loss was such a small part of its property's value, the court concluded that the developer had failed to show that the City's creation of the new PUD unreasonably interfered with its use of the property. The court further noted that although this one factor is not dispositive, the (relatively small) magnitude of the change in value weighed heavily against the developer's claims.

- Here, in contrast, Harrison paid $10,000 per acre, the Tract would have been worth $20,000 per acre if used for industrial purposes (*see* Appraisal), but it is worth only a few hundred dollars per acre in its as-is, idle condition (*see* Harrison/Conner emails), as it is unsuitable for residential development or other non-industrial uses.

- The City may argue that the per-acre value of the Tract is more than a few hundred dollars, even in its as-is, idle condition, citing the other bids made for the property, which ranged from $20,000 to $88,800. Examinees should note, however, that those bids were made before the City rejected Harrison's proposed non-residential use of the Tract, that other bidders (like Harrison) bid on the Tract expecting that the R–1 zoning would not be enforced, and therefore the other bids are not indicative of the property's as-is value.

- Although purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite these risks, arguably a diminution in value of over 99% is excessive and provides strong support for the argument that the regulation is the functional equivalent of a classic taking. Thus fairness and justice demand that the burden of the regulation be borne by the public rather than by Harrison alone.

- Examinees should conclude that denial of Harrison's rezoning application reduced the Tract's value to a fraction of what it would have been had his rezoning application been granted, and that the magnitude of Harrison's loss weighs heavily in his favor.

<u>*Factor #2: Interference with Reasonable Investment-Backed Expectations*</u>

- The partial regulatory takings analysis also considers the extent to which the regulation interferes with the landowner's *reasonable* investment-backed expectations. In doing so, courts look to the historical uses of the property and assess whether the government regulation has altered the existing or permitted uses of the property.*Newpark.*

- In *Newpark,* the zoning always required one-acre-minimum lots, the historical use of the property was farmland, and the property had been used as a pasture and was proposed for residential development (albeit higher density than the one-acre minimum). In *Venture,* the developer conceded that the only harm it had suffered was more competition from the City's creation of a new PUD that increased the number of housing units and a 4%

diminution in the property's value. In neither case had the city rezoned the property at issue to prohibit a current or proposed use.

- Here, in contrast, the Tract had been used as an industrial-type operation as a Franklin National Guard armory and vehicle storage facility for over 35 years. Even though the Tract was zoned R–1 in 1994, the National Guard continued its operations on the Tract without objection from the City. On these facts, Harrison had a reasonable belief that the Tract was "grandfathered in" and was not subject to the R–1 ordinance.

- The existing and permitted uses of the property constitute the "primary expectation" of a landowner affected by a regulation. *Venture* (citing *Sheffield*). Given the long-standing use of the Tract for industrial-type operations, arguably the City did alter the Tract's "existing and permitted uses" and interfered with Harrison's "primary expectation" when it denied his rezoning application.

- In addition, Harrison's email exchange with the real estate agent Amy Conner makes clear that the Tract cannot feasibly be developed for residential or other non-industrial uses. It would cost $15,000 to $20,000 per lot just to grade the land and install utilities and drainage improvements, plus at least $75,000 to remove the existing buildings and parking lot and clear the wooded areas. And then, according to Conner, Harrison would be "lucky" to sell each lot for $5,000. Moreover, the Tract is on the outskirts of the City in an area with very little residential growth in the last 50 years. (*See* Client Interview.)

- Thus, examinees should conclude that the denial of Harrison's rezoning application substantially interfered with his reasonable investment-backed expectations.

Factor #3: Character of the Governmental Action

- This factor is the least concrete and carries the least weight. *See Venture.* The purpose of this factor is to determine whether a regulation disproportionately harms a particular property. If a governmental zoning action is general in character, that weighs against the argument that a taking has occurred, whereas if the governmental action affects the owner's property disproportionately harshly, that weighs in the owner's favor.*Venture.*

- In *Venture,* the plaintiff argued that the city had created the new PUD to benefit another private developer, as opposed to the general public. Although there was evidence to support the argument that the city's action was motivated by a desire to benefit the competing developer, the court held that that this was not enough to outweigh the other two *Penn Central* factors and no partial regulatory taking had occurred.

- Here, it is unknown whether other nearby properties were included in the 1994 R–1 zoning ordinance. Thus, it is unclear whether the zoning restriction affected other property or the extent to which it was "general in character." However, the denial of Harrison's rezoning application clearly affected his property. Thus, examinees should conclude that this third factor likely weighs in Harrison's favor.

- Even if this third factor is neutral as to Harrison, because it is accorded the least weight of the three and because the other two factors weigh heavily in his favor, examinees should conclude that a partial regulatory taking has occurred.

C. Land-Use Exaction

- A land-use exaction occurs when governmental approval is conditioned upon a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development. *Newpark.*
- There is no indication that the City Council offered to condition approval of Harrison's rezoning application upon his taking some action.
- To the contrary, the Council unanimously denied the application. No Council member suggested that there were conditions under which the application would be approved.
- Accordingly, there has been no land-use exaction.

D. The "Substantial Advancement" Regulatory Takings Test

- Whether the "substantially advances" test for a regulatory taking remains valid under Franklin law is questionable in light of the U.S. Supreme Court's holding in *Lingle* and the discussion in *Newpark*. However, because the Franklin Supreme Court has not yet ruled on the validity of the "substantially advances" test, and because the court in *Venture* employed the test, examinees should analyze whether it would apply to the facts stated.
- This particular test would apply only to a claim asserted under the Franklin takings clause, because *Lingle* clearly invalidated such a claim in federal takings cases.
- The "substantial advancement" requirement examines the nexus between the effect of the ordinance and the legitimate state interest it is supposed to advance. The standard requires that the ordinance "substantially advance" the legitimate state interest sought to be achieved rather than merely analyzing whether the City could rationally have decided that the measure achieved a legitimate objective. Note that this test is not, however, equivalent to the "rational basis" standard used in equal protection and due process claims. *Venture.*
- In *Venture,* the developer alleged that the City's stated goal in adopting a rezoning ordinance (to promote a mixed-use, pedestrian-friendly, urban development that would enhance the quality of life of its citizens) was a pretext, and that the City's actual purpose was to benefit another developer. The court concluded that it was not required to consider the City's *actual* purpose. Instead, it focused on the nexus between the effect of the ordinance and the legitimate state interest it was *supposed* to advance, and concluded that the rezoning ordinance passed the "substantially advances" test.
- Here, it is likely that a court would look at the stated reasons for the denial of Harrison's rezoning application (i.e., City Council members' concerns about allowing a truck-driving school to operate near an existing park, and the belief that the property could be

developed for non-industrial uses such as a church or office) and conclude that denying Harrison's rezoning application would substantially advance those stated goals.

- Thus, if the substantial advancement test remains valid under the Franklin constitution, it is unlikely that Harrison would prevail on such a claim.

IV. Conclusion

Examinees should conclude that Harrison has (1) a colorable, but unlikely, total regulatory takings claim, (2) a strong partial regulatory takings claim, and (3) no claim for a land-use exaction. Finally, assuming that the "substantially advances" test remains viable under the Franklin constitution, he is unlikely to prevail on such a claim.

July 2014 MPT:
In re Kay Struckman

File

RAMIREZ & JAY LLP

Attorneys at Law
610 E. Broadway
Windsor, Franklin 33073

M E M O R A N D U M

TO: Examinee
FROM: Steve Ramirez
DATE: July 29, 2014
RE: Kay Struckman consultation

I have been retained by Kay Struckman, a local attorney. As you will see from her letter, Ms. Struckman wishes to modify her current retainer agreement to require arbitration of fee disputes. She wants to be sure that the modification of her retainer agreements with existing clients is ethical and that the arbitration provision would be legally enforceable.

I have attached some materials that bear on Ms. Struckman's question, including a judicial decision and a formal ethics opinion, both from outside of Franklin, that deal with similar issues. Franklin, Columbia, and Olympia have all adopted identical versions of Rule 1.8 of the Model Rules of Professional Conduct of the American Bar Association. There is no Franklin ethics opinion that has addressed the specific issues raised by Ms. Struckman, but there are two Franklin Court of Appeal cases that may be relevant.

I am scheduled to meet with Ms. Struckman this week to advise her on the goals set forth in her letter. To help me prepare for the meeting, please draft a memorandum to me responding to her request for advice as communicated in her letter. Your memorandum should include support for your conclusions with citation to legal authority, taking care to distinguish contrary authority, where appropriate.

I think it is possible—from both an ethics and a legal enforceability perspective—to modify her retainer agreements to require arbitration of fee disputes, but only if certain conditions are met. Be sure to set forth those conditions in your memorandum.

KAY STRUCKMAN
Attorney at Law
9300 Wisteria Boulevard, Suite 301
Brule, Franklin 33036

July 22, 2014

Steve Ramirez
Ramirez & Jay LLP
610 E. Broadway
Windsor, Franklin 33073

Re: Modification of Retainer Agreements

Dear Steve:

I am pleased that you found time to talk with me earlier today and even more pleased that you have agreed to advise me in this matter. I write to confirm the scope of advice I seek and confirm what I said during our meeting.

As I told you, the question on which I need legal advice is whether I may ethically modify retainer agreements with existing clients to include a provision requiring binding arbitration to resolve future fee disputes, and, if so, what is necessary to ensure that any resulting modification would be legally enforceable.

By way of background, I am a sole practitioner who represents small businesses and individuals. Most of my clients seek advice on small business matters including government regulation, licensing, incorporating, and related matters; family matters including adoption, divorce, custody, and guardianship; and estate planning. I do litigation as well as transactional work related to these matters. Many clients have asked me to insert arbitration clauses in the contracts I draft for their businesses. Although I haven't had any fee disputes, I've been considering adding an arbitration clause to my retainer agreements to be proactive.

My current retainer agreement allows annual increases in my fees. I would like to modify my retainer agreements with existing clients to include a provision requiring binding arbitration of future fee disputes in exchange for forgoing annual increases in my fees for two years. The provision I would like to include is as follows:

> Any claim or controversy arising out of, or relating to, Lawyer's representation of Client shall be settled by arbitration, and binding judgment on the arbitration award may be entered by any court having jurisdiction thereof.

I request your advice on these particular issues:

First, would it be ethical for me to modify my retainer agreements with existing clients using the above language to cover future fee disputes? Is the language I've proposed above sufficient, and if not, why? What else do I need to add to make the provision comport with my ethical obligations to my clients? What process, if any, must I provide to my clients to modify their retainer agreements? In short, what steps do I need to take to ensure compliance with the Franklin Rules of Professional Conduct?

Second, assuming that it is ethical to modify my retainer agreements, would the language I propose to cover future fee disputes be legally enforceable? If not, what revisions to the language would I need to make? Is there anything else that I would need to do to ensure legal enforceability?

Although I want to do right by my clients, I do not want to impose undue burdens on myself. Fee disputes are not complicated. I would like to see fee disputes resolved quickly and with a minimum of costs to me—and to my clients.

I look forward to meeting with you to discuss these matters.

Very truly yours,

Kay Struckman

Kay Struckman

July 2014 MPT:
In re Kay Struckman

Library

FRANKLIN RULE OF PROFESSIONAL CONDUCT 1.8

[Franklin Rule 1.8 is identical to Rule 1.8 of the ABA Model Rules of Professional Conduct; however, the Franklin Supreme Court has added its own comments.]

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

. . .

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement . . . .

* * *

Comments

(i) The Franklin Supreme Court has ruled that although modifying a retainer agreement with an existing client amounts to a business transaction within the meaning of Rule 1.8, entering into a retainer agreement with a new client does not. *Rice v. Gravier Co.* (Fr. Sup. Ct. 1992).

* * *

COLUMBIA STATE BAR ETHICS COMMITTEE
ETHICS OPINION 2011-91

Question Presented and Brief Answer

May a lawyer modify a retainer agreement with an existing client to include a provision requiring binding arbitration of any future malpractice claim?

No. We do not believe that the lawyer can meet the requirements of Rule 1.8 of the Columbia Rules of Professional Conduct in making such a modification.

Discussion

Nothing in the Columbia Rules of Professional Conduct prohibits agreements requiring binding arbitration of existing malpractice claims. An agreement to modify a retainer agreement is governed by Rule 1.8 as well as by other principles discussed herein. We have a number of concerns.

First, Rule 1.8 requires that the lawyer inform the client in writing of the essential terms of the agreement. We assume that lawyers will make a sincere effort to explain the arbitration process, but we question whether the client will understand the advantages and disadvantages of arbitration as well as the tactical considerations of arbitration versus litigation. We are most concerned about those small business and individual clients who lack the benefit of in-house counsel or other resources to advise them about arbitration. It is not enough to explain that arbitration differs from litigation. Clients must be told the major implications of arbitration, such as lack of formal discovery and lack of a jury or judge trial. Because the proposed agreement covers *future* malpractice claims, the client is asked to enter into the agreement without consideration of the particular facts and circumstances of a dispute that might arise at some later time.

Second, lawyers are in a fiduciary relationship with their clients. Lawyers bear the burden of demonstrating the reasonableness and good faith of the agreements they enter into with their clients. Should a client challenge the agreement requiring binding arbitration of future malpractice claims, the court will be called upon to scrutinize the agreement carefully. The standard of good faith and reasonableness implies a heightened obligation of lawyers to be fair and frank in specifying the terms of the attorney-client relationship. Most clients will be less sophisticated than lawyers in understanding how arbitration differs from litigation. It will be very difficult for lawyers to meet their obligations as fiduciaries under these circumstances.

Third, we are concerned that a few lawyers might use mandatory binding arbitration of future malpractice claims to avoid investigations into misconduct. By doing so, a lawyer would in effect deprive the Columbia Supreme Court, and its Disciplinary Commission, of its jurisdiction to investigate and discipline lawyers who engage in misconduct. We cannot condone a tactic that undermines the authority of the Supreme Court to oversee the conduct of lawyers.

Although some courts have approved agreements requiring binding arbitration of future fee disputes, they have imposed certain conditions. A common condition is that the lawyer must urge the client to seek the advice of independent legal counsel concerning the agreement. Such a condition is consistent with our Rule 1.8(a), which requires that the lawyer advise the client to seek the advice of independent legal counsel and give the client a reasonable opportunity to do so. We are not convinced that lawyers can meet this condition with respect to an agreement requiring binding arbitration of future *malpractice* claims. It is unrealistic to expect a client to seek and pay for independent counsel in the midst of the lawyer's representation. Moreover, the client is being told not to trust the client's own lawyer.

Another common condition is that the lawyer must advise the client that certain legal rights, including the right to trial, may be affected. The lawyer must also explain the implications of that forfeiture of the right to a jury trial.

An agreement requiring binding arbitration of malpractice claims may be appropriate once the claim has arisen and the client is represented by new counsel who can adequately inform and advise the client about arbitration. However, we conclude that a lawyer may not modify a retainer agreement with an existing client to require binding arbitration of future malpractice claims.

Lawrence v. Walker

Franklin Court of Appeal (2006)

Gina Lawrence filed a claim for malpractice against Robert Walker, whom she had retained as her attorney in a divorce matter. Walker responded that the retainer agreement signed by Lawrence at the inception of the representation requires binding arbitration of malpractice claims. The district court denied Walker's motion to compel arbitration, and this interlocutory appeal followed.

Because arbitration is a matter of contract, the threshold issue here is whether attorney and client agreed to mandatory binding arbitration of the malpractice claim. But because clients as a class are particularly dependent on, and vulnerable to, their attorneys and therefore deserve safeguards to protect their interests, an agreement requiring binding arbitration must have been entered into openly and fairly to be legally enforceable. *Cf. Johnson v. LM Corp*. (Fr. Ct. App. 2004) (so holding as to employees vis-à-vis employers).

The retainer agreement that Lawrence signed requires the parties to submit to binding arbitration "disputes regarding legal fees and any other aspect of our attorney-client relationship." The agreement does not specify that malpractice claims are one of the matters to be arbitrated.

An agreement requiring binding arbitration effects a waiver of several rights. In rendering an award, arbitrators, unlike judges, are not required to follow the law. Awards based on an erroneous interpretation of the law or evidence cannot be overturned by the courts except in very limited instances. Because of limited judicial review, the choice of arbitrator is critical.

Further, parties may or may not have certain procedural rights in arbitration, such as the right to subpoena witnesses, to cross-examine them, or even to participate in an in-person hearing. Arbitration proceedings are often confidential. There is no reporting system that provides convenient public access to these proceedings. Therefore, it is unlikely that a client could know what to expect from an arbitration.

Because of the implications of an agreement to arbitration, courts enforce an agreement requiring binding arbitration only where the client has been explicitly made aware of the existence of the arbitration provision and its implications. Absent notification and at least some explanation, the client cannot be said to have exercised a “real choice” in entering into the agreement.

The arbitration provision in the present case was part of a retainer agreement drafted by the attorney and presented to the client for her signature. It was not the product of negotiation.

It is undisputed that the term “malpractice” does not appear in the retainer agreement. The critical sentence reads “disputes regarding legal fees and any other aspect of our attorney-client relationship.” It is more likely that Lawrence, the client, understood only that she was agreeing to mandatory binding arbitration of future fee disputes, not that her agreement also affected malpractice claims.

The language of an agreement should be interpreted most strongly against the party who created the uncertainty. This ambiguity in the language might alone be reason to conclude that Lawrence did not voluntarily agree to arbitrate malpractice claims. Moreover, where a fiduciary duty exists, as here between an attorney and a client, the attorney bears the burden of proving the good faith of any agreement the attorney enters into with the client. In such a case, the attorney is well advised to draft the agreement clearly.

We do not mean to express an opinion against arbitration of disputes between lawyers and clients. Where parties enter into an agreement openly and with complete information, arbitration represents an appropriate and even desirable approach to resolving such disputes. Arbitration affords both parties a speedier and often less costly method to reach a resolution of a dispute. It employs more flexible rules of evidence and procedure.

Having said this, we repeat that agreements requiring binding arbitration involve a waiver of significant rights, and should be entered into only after full disclosure of their consequences. Moreover, the court must carefully scrutinize agreements between clients and attorneys to determine that their terms are fair and reasonable. In *Johnson v. LM Corp.*, we examined the terms of an arbitration program for employees. We articulated the minimum requirements for the enforceability of an agreement requiring binding arbitration in a context involving employers and employees and the latter's statutory rights. We believe that the context here, involving attorneys and clients and the former's fiduciary duties, is analogous.

In this case, the attorney has failed in his burden to show that the client knowingly entered into the agreement requiring binding arbitration of malpractice claims. Therefore, we need not consider the protections we discussed in *Johnson*.

Accordingly, we conclude that the client did not enter into an agreement requiring binding arbitration of malpractice claims that was legally enforceable. In light of that holding, we need not address the question of whether the agreement was ethically compliant.

Affirmed.

Johnson v. LM Corporation

Franklin Court of Appeal (2004)

Claire Johnson and other employees brought an action seeking a declaration that the LM Mandatory Employee Arbitration Program is contrary to public policy and therefore unlawful. The LM program requires company employees to submit employment disputes to binding arbitration, including those claims based on statutes such as the Equal Pay Act and the Human Rights Act. The district court declared the program lawful, and the employees appealed.

By agreeing to mandatory binding arbitration of a statutory claim, the parties do not forgo the substantive rights afforded by the statute. Rather, the parties submit the dispute to an arbitral, rather than a judicial, forum. The employees argue, however, that the arbitration process contains a number of shortcomings that prevent the vindication of their statutory rights.

Our Supreme Court has held that employees as a class are particularly dependent on, and vulnerable to, their employers and therefore deserve safeguards to protect their interests. *Lafayette v. Armstrong* (Fr. Sup. Ct. 1999). On the basis of that holding, the Court formulated five minimum requirements for a legally enforceable employment agreement requiring binding arbitration of statutory claims. Such an arbitration agreement must (1) provide for a neutral arbitrator, (2) provide for more than minimal discovery, (3) require a written, reasoned decision, (4) provide for all of the types of relief that would otherwise be available in court, and (5) not require employees to pay unreasonable fees or costs as a condition of access to the arbitration forum. *Id.*

Because of the limited review of arbitration decisions, the choice of arbitrator may be crucial. There is variety in how arbitrators are selected and variety in the number of arbitrators used in an arbitration. Regardless of the choices available, what is critical is that every arbitrator be neutral. To ensure neutrality, an arbitrator must disclose any grounds that might exist for a conflict between the arbitrator's interests and parties' interests. According to the LM program, the arbitrators are to be selected from the Franklin Arbitration Association (FAA), a long-standing and well-respected private nonprofit provider of arbitrators. To maintain its reputation, the FAA requires its arbitrators to disclose any conflicts of interest that could compromise their neutrality. Assuming that the program in place requires that the arbitrators provide information about potential conflicts of interest so that the parties have the information necessary to determine whether to challenge any arbitrator assigned, the LM program passes muster as providing for neutral arbitrators.

The employees claim that the limit on the number of depositions permitted in the LM program, namely three depositions by each party, frustrates their ability to conduct discovery and thus fails to meet *Lafayette*'s second requirement that there be more than minimal discovery. While due process may not require the same degree of discovery that our courts permit, due process does require that there be a fair opportunity to be heard. Arguably, some discovery may be necessary if parties are to have a fair hearing. However, in this case, the employees' argument has no merit. Even our state rules of civil procedure limit the number of depositions that may be taken without a showing that additional discovery is needed. Depositions are not the only means of discovery useful to the parties in preparing for hearings. Often, a simple exchange of documents will assist the parties in trial preparation. We presume, because there is no evidence to the contrary, that an arbitrator would permit additional discovery if a proper showing were made.

The employees argue that the LM program provides no assurance that arbitrators will issue a written decision stating the reasons for their decisions, and no assurance that arbitrators will be aware that they may award all the relief available under the statute. The employees further argue that because review is limited, they will have no means of determining whether the arbitrators followed the law unless they issue written decisions giving reasons for the decision. Our Supreme Court has already ruled on the necessity of a written decision giving reasons for the decision in arbitration proceedings. *Lake v. Whiteside* (Fr. Sup. Ct. 1994). While the procedures in the case at bar do not require a written, reasoned decision, this court must assume that the arbitrators will follow the law and produce such a decision. By reviewing the reasons given for the arbitrators' written decisions, the employees will be able to determine whether the arbitrators considered all the remedies available.

Finally, the employees argue that the LM program violates the requirement that the parties not be required to pay unreasonable fees or costs as a condition of accessing the arbitral forum. They point to provisions in the LM program that each party to the arbitration shall pay a pro rata share of the fees of the arbitrators, together with other costs of the arbitration incurred or approved by the arbitrators.

Unfortunately, in this case, the record is unclear as to what the fees and costs are. The parties are in dispute as to how the arbitration expenses will be divided between the employees and the employer. It is possible that exorbitant fees and costs will frustrate the employees' ability to pursue their statutory claims. If so, the program may be unlawful. Because the record here is unclear, we vacate the judgment of the district court and remand for further proceedings.

Vacated and remanded.

Sloane v. Davis

Olympia Supreme Court (2009)

Attorney Margit Davis and her client, Liam Sloane, entered into a retainer agreement that provided that the parties would use binding arbitration to resolve any disputes concerning Davis's representation. Sloane later sued Davis for negligence in representing him in a business matter. Davis moved to compel arbitration, which the trial court granted. The court of appeals affirmed.

Sloane concedes that he voluntarily agreed to the arbitration clause in the retainer agreement, concedes that the arbitration process was generally fair, and concedes that if this agreement applied to any issue other than attorney malpractice, it would be legally enforceable. He simply argues that, as a matter of public policy, attorneys should not be permitted to use arbitration to avoid litigation of an attorney malpractice matter.

This court has previously found that attorneys must adhere to certain standards when entering into business transactions with their clients. These standards include ensuring that the terms of the transaction are fair and are fully disclosed in writing and in a manner reasonably understandable to the client. The attorney must also advise the client in writing of the desirability of seeking independent legal advice about the transaction. The client must then give informed consent in writing. *Olympia Rule of Professional Conduct 1.8*

Davis more than met her obligations under Rule 1.8. First, the terms of the business transaction, here the arbitration process, were fair. Since Sloane concedes that the arbitration process Davis uses is fair, we need not further consider that issue.

Second, Davis made a full disclosure in writing in a manner that was easily understandable to the client. When Davis met with Sloane, she orally explained the retainer agreement, including the arbitration clause. Davis then mailed a copy of the retainer agreement to Sloane along with a brochure explaining arbitration. The brochure explained that by agreeing to arbitrate, Sloane would waive his right to a jury trial. The brochure explained the types of matters that might be arbitrated, including malpractice claims, and also provided examples of arbitration procedures that might be different from those Sloane would experience in litigation. It also explained that the arbitrators would be required to disclose any conflicts of interest, follow the law, award appropriate remedies available under the law, and issue a written decision explaining the basis for the decision.

Further, the brochure sent to Sloane explained that Sloane could and should seek the advice of another attorney before signing the retainer agreement. The accompanying letter asked Sloane to sign and return the retainer agreement within one week, if Sloane agreed to it. In fact, Sloane did not seek independent legal advice but signed the retainer agreement and returned it to Davis on the same day he received it.

Sloane's argument that Davis failed to meet her obligations under Rule 1.8 is without merit. Likewise, Sloane's argument that he was unaware of the ramifications of the arbitration process is without merit.

Sloane also argues that, as a matter of public policy, even if the requirements of Rule 1.8 were met and even if the agreement to arbitrate was legally enforceable, attorneys should not be permitted to use arbitration to avoid litigation of a dispute with a client. We disagree.

By agreeing to use arbitration rather than litigation to resolve an attorney malpractice claim, the client does not give up the right to sue. The client simply shifts determination of the dispute from the courtroom to an arbitral forum. In doing so, the client and the attorney often benefit from a process that can be speedier and more cost-effective than litigation. The arbitration process can offer a more informal means of resolution and provides a private forum, often more attractive to client and attorney alike.

Sloane is correct that the attorney cannot prospectively limit liability to the client. But this retainer agreement contains no limit on liability. Rather, where the arbitrator is bound to follow the law and to award remedies, if any, consistent with the law, there does not appear to be any limit.

Sloane also argues that the attorney cannot limit the ability of the Olympia Supreme Court to discipline attorneys who violate the norms of practice. But nothing in this retainer agreement prevents Sloane or anyone from filing a charge with the Board of Attorney Discipline.

Affirmed.

July 2014 MPT:
In re Kay Struckman

Point Sheet

This July 2014 MPT Point Sheet was provided to bar examiners to assist in grading the examination. It addresses the factual and legal points encompassed within the MPT. While it is illustrative of the discussions that might have appeared in excellent responses constructed by examinees, it is more detailed than examinee responses were expected to be.

DRAFTERS' POINT SHEET

The task for examinees in this performance test is to draft a memorandum to prepare Steve Ramirez, the supervising attorney, to advise Kay Struckman, a local attorney, about a modification she proposes to make in her retainer agreements that would require the use of binding arbitration for fee disputes. Struckman asks whether she may ethically seek to modify her retainer agreements with existing clients to include a provision requiring the use of binding arbitration to resolve future fee disputes, and whether any resulting modification using the language she proposes would be legally enforceable.

The File contains the instructional memo from Ramirez and a letter from Struckman. The Library contains Franklin Rule of Professional Conduct 1.8 (Franklin RPC 1.8); a Columbia State Bar Ethics Opinion (Ethics Opinion); *Lawrence v. Walker* and *Johnson v. LM Corporation*, two cases from the Franklin appellate court; and *Sloane v. Davis*, an Olympia Supreme Court case.

The following discussion covers all the points the drafters of the item intended to raise in the problem.

I. Overview

Examinees are directed to two issues:

1. Whether Struckman may ethically seek to modify her retainer agreements with existing clients to include a provision requiring the use of binding arbitration to resolve future fee disputes; and what, if any, revisions to the proposed language she would need to make; and what, if any, requirements she would need to meet.
2. Whether the proposed modification would be legally enforceable; what, if any, revisions are needed to the proposed language; and what, if any, requirements must be satisfied.

No organizational format is specified, but examinees should follow a clear pattern in analyzing the ethical and legal issues. This point sheet will address the issue of requirements within the discussion of the two major issues — ethics and legal enforceability. Alternatively, an examinee may discuss the requirements necessary for an ethical and legally enforceable arbitration agreement in a third, separate section, or may incorporate that discussion into the two main sections.

An examinee could also organize the memo around the requirements Struckman should follow, noting which are required by Rule 1.8 and which are required for legal enforceability.

Examinees should also analyze the effect of the option Struckman is offering her clients—agree to arbitration in exchange for ensuring no annual increase in fees for two years or not agree to arbitration and maintain the existing retainer agreement which provides for annual increases in fees.

While there can be disagreement concerning the use of binding arbitration to resolve disputes between lawyers and clients, examinees have been instructed to help Struckman achieve her goals, if possible. They should conclude that arbitration agreements regarding future fee disputes are likely to be ethical and legally enforceable if certain requirements are met. Examinees should identify those requirements.

II. Overview of the Law

The Franklin Supreme Court has ruled that modifying a retainer agreement with an existing client amounts to a business transaction within the meaning of Rule 1.8. Franklin Rule of Professional Conduct, cmt.1. This Rule is identical to the ABA Model Rule of Professional Conduct 1.8. Therefore, examinees must conclude that to be ethical, any provision Struckman drafts must comply with the terms of Rule 1.8. The requirements of Rule 1.8 are discussed in the Columbia State Bar Ethics Opinion 2011-91 and the *Sloane v. Davis* case.

In its opinion, the Columbia Bar Ethics Committee, examining its Rule 1.8 (also identical to the ABA Rule), concluded that lawyers may not modify retainer agreements with existing clients to include a provision requiring binding arbitration of any future malpractice claims. The Committee identified challenges and conditions that examinees should consider. The issues are the requirement for the client's voluntary consent, the requirement that the transaction be fair and done in good faith due to the fiduciary relationship between lawyer and client, and the absence of any attempt to undermine the court's ability to investigate any claims of lawyer misconduct. The following conditions must be met: the lawyer must tell the client of the advisability of seeking the advice of independent legal counsel and give the client the opportunity to do so, and, the lawyer must advise the client of the rights affected or forfeited by opting for arbitration, rights which include the right to a jury trial.

The *Sloane* case from the Olympia Supreme Court addresses the requirements of that state's Rule 1.8, which, too, is identical to the ABA Rule. *Sloane* involved an agreement between the client and the attorney to arbitrate future malpractice claims. The client argued that, as a matter of public policy, attorneys should not be permitted to use arbitration to avoid litigation of attorney malpractice claims. Although *Sloane* is from another jurisdiction and deals with malpractice claims and not fee disputes, the court approved the use of arbitration. Thus, *Sloane* presents the examinees with a model of an agreement to arbitrate that meets the requirements of Rule 1.8. Examinees should discuss each of the challenges presented in *Sloane*.

First, under Rule 1.8, the business transaction, here the arbitration agreement, must be fair. The fairness issue in *Sloane* was conceded. The fairness issue will be further discussed below as a matter of legal enforceability. Fairness requires that the attorney advise the client as to the arbitration process. In *Sloane*, the attorney explained the retainer agreement, including the arbitration provision during a meeting with the client. The attorney then mailed a copy of the agreement along with a brochure explaining arbitration to the client. The brochure explained that by agreeing to arbitration, the client would waive the right to a jury trial. The brochure explained the types of matters that might be arbitrated and provided examples of arbitration procedures that might be different from those in litigation; it also explained that arbitrators would be required to disclose conflicts of interest, follow the law, award appropriate remedies available under the law, and issue a written decision explaining the basis of the decision.

Second, under Rule 1.8, the attorney is also required to advise the client to seek the advice of independent counsel before signing the agreement. In *Sloane*, the brochure sent to the client gave that advice and the accompanying letter gave the client one week to seek that advice and sign and return the agreement.

Last, the *Sloane* case makes the point that attorneys cannot prospectively limit their liability to a client*, see also* Rule 1.8(h), nor limit the ability of the Supreme Court to discipline attorneys who violate the norms of practice. Because arbitration is a matter of contract law, Struckman must not only meet the ethical requirements of Rule 1.8; she must also ensure that her retainer agreement is legally enforceable. Some of the steps she must take to be ethical will overlap with the requirements of legal enforceability. The *Lawrence v. Walker* and *Johnson v. LM Corporation* cases address the legal requirements of agreements to arbitrate future disputes.

Lawrence is the only Franklin case to address the issue of binding arbitration of attorney disputes, and it deals with an attorney malpractice claim. Although it concludes that the agreement in *Lawrence* was not legally enforceable, it sets out the requirements for legal enforceability. The first requirement is that the client and attorney agreed to the arbitration. Because of the nature of the attorney-client relationship, the agreement must have been entered into openly and fairly. One aspect of openness and fairness is that the agreement specify the types of disputes to be arbitrated. Another aspect of openness is that the client must be made aware of the existence of the arbitration provision and its implications, specifically the differences between litigation and arbitration, to ensure that the client had a real choice in entering into the agreement. Language that is vague will be interpreted against the drafter (namely, the lawyer).

The second requirement for legal enforceability is that the terms of the arbitration process must be fair. The fairness requirement is a result of the fiduciary relationship between the lawyer and client. The minimal requirements of fairness of the arbitration process are discussed in the *Johnson* case, which arose in the employment context. The *Johnson* case identifies the minimal requirements of fairness: a neutral arbitrator; more than minimal discovery; a written, reasoned decision; availability of all types of relief otherwise available in a court; and no unreasonable fees or costs as a condition of access to arbitration.

The discussion below sets forth how examinees should analyze the law and advise Struckman.

III. Discussion

A. Arbitration of future fee disputes — ethical issues

May Struckman ethically seek to modify her retainer agreements with existing clients to require binding arbitration of future fee disputes? Examinees should answer yes to the ethical question, but only if certain conditions, as described below, are met.

Attorneys are encouraged to use informal means of resolving disputes with clients concerning fees. Arbitration provides prompt and cost-effective resolution of disputes. *Lawrence v. Walker*.

Franklin RPC 1.8(a) prohibits lawyers from entering into business transactions with clients unless certain conditions are met.

- Modification of a retainer agreement with an existing client amounts to a business transaction between lawyer and client within the meaning of Franklin RPC 1.8. *Rice v. Gravier Co.* (Fr. Sup. Ct. 1992), cited in cmt. (i) to Franklin RPC 1.8.
  - Attorneys may enter into business transactions with clients within the meaning of Franklin RPC 1.8 if they meet the rule's requirements:
  - The transaction and its terms must be fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client. Franklin RPC 1.8(a)(1); *see also Sloane v. Davis*.
    - As proposed, Struckman's arbitration provision does not meet this requirement because it does not fully disclose its terms.
    - Struckman could satisfy this requirement by adding related text to the modified retainer agreements. The addition should explain that agreeing to arbitration is an agreement to forgo litigation and that arbitration may have different procedures and rules from those of litigation.
    - Struckman could use a brochure such as that used in *Sloane* to fully disclose and explain the terms of the arbitration process.
  - The transaction and its terms must be fair and reasonable to the client. The attorney, because of the fiduciary relationship, bears the burden of showing that the terms are fair and reasonable. Franklin RPC 1.8; *see also* Ethics Opinion.
    - Struckman could meet this standard if the terms of her proposed arbitration provision and the modified retainer agreements as a whole are reasonable and in good faith. If the provision is legally enforceable and the arbitration process itself meets the minimal requirements of fairness as outlined in *Johnson* and discussed below, Struckman should satisfy the requirement of reasonableness and good faith.
    - Use of a brochure explaining the arbitration process such as that used in *Sloane* would help Struckman meet her burden.

- The client must be advised in writing of the desirability of seeking the advice of independent legal counsel on the transaction and must be given a reasonable opportunity to do so. Franklin RPC 1.8(a)(2).
  - Struckman's proposed arbitration provision does not meet this requirement because it is silent on this score and hence does not give the client any opportunity to seek the advice of independent legal counsel.
  - Struckman could satisfy this requirement by adding related text to the modified retainer agreements specifying that the client is being given an opportunity to seek independent legal counsel.
  - Struckman could use a brochure to advise the client of the desirability of seeking independent legal counsel. *See Sloane*.
- The client must give informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. Franklin RPC 1.8(a)(3).
  - The arbitration provision proposed by Struckman does not meet this requirement because it is silent on this score.
  - Struckman could satisfy this requirement by adding related text to the modified retainer agreements that includes a signature line for the client and a statement that Struckman is not representing the client in entering into the arbitration provision.
  - Struckman could give clients a week's time to consider this choice and provide written consent, as was done in *Sloane*.

Attorneys may not use arbitration to deter investigation of alleged misconduct. *Sloane.*

- There is no indication that the arbitration process Struckman proposes would prevent the client from filing any allegations of misconduct or would prevent the Supreme Court from investigating any such allegations or disciplining Struckman. For example, there is no language purporting to bar any client from complaining to the appropriate disciplinary authorities. Nor is Struckman seeking to require existing clients to arbitrate future *malpractice* claims, as was prohibited in the

Columbia Ethics Opinion. Also, Struckman does not limit her liability to clients in any way, as might be done in an agreement to arbitrate malpractice claims.

In sum, if Struckman meets the requirements discussed above by fleshing out her proposed modification, she may ethically seek to modify her retainer agreements with existing clients to require binding arbitration of future fee disputes.

B. Arbitration of fee disputes — legal enforceability issues

Next, examinees should answer yes to the legal question (whether any resulting modification in the agreements to use binding arbitration would be legally enforceable) but only if certain conditions, as described below, are met.

- Agreements to arbitrate must be voluntary.
  - Because clients are particularly dependent on and vulnerable to their attorneys, a question arises as to whether they may truly be able to give consent. *Lawrence.* Examinees should note that this issue is especially of concern where the client is already in a relationship with the attorney.
  - But Struckman could ensure that the provision requiring binding arbitration of future fee disputes in the modified retainer agreements would be voluntary by meeting the ethical requirements specified above, which should adequately inform existing clients of the nature and consequences of the provision, and by *not* requiring assent as a condition for continuing representation.
  - Further, Struckman intends to offer her existing clients a benefit in exchange for the provision requiring binding arbitration of future fee disputes in the modified retainer agreements—a forfeiture of her right to adjust fees for two years. The clients could choose not to enter into the modification and instead to face the possible fee adjustments. The fact that clients have this option supports the argument that the agreement to arbitrate is voluntary.
- The agreement to arbitrate must be informed. An agreement to arbitrate may effect a waiver of the right to a trial by judge or jury. A client forfeiting such a significant right should be made aware by the attorney of the existence of the arbitration provision and its implications. *Lawrence*

- As described above, Struckman must inform the client about the arbitration process. If she follows the advice given above in regard to explaining the arbitration process and how it differs from litigation, she should be able to show that the client gave informed consent to arbitrate.
- *Lawrence* rejected a provision purporting to require binding arbitration of future malpractice claims where the provision failed to explicitly refer to "malpractice."
- The provision proposed by Struckman ("any claim . . . arising out of . . . Lawyer's representation of Client") does not refer to "fees." To meet the standard in *Lawrence*, Struckman must rewrite the clause to specify fee disputes as the type of disputes to be arbitrated.

- To be lawful, arbitration must be fundamentally fair. There are some concerns that, because the arbitral forum does not provide the same protections as the judicial forum, arbitration may lack fairness.
  - There is limited review of arbitration decisions. *Lawrence.*
  - Arbitrators need not follow the law, and discovery may be limited. *Id*.
  - Parties may not have the right to subpoena or cross-examine witnesses or even to participate in an in-person hearing. *Id*.
  - The choice of arbitrators may be critical. *Id*.
  - Because arbitration decisions are not reported, the client may not have access to such decisions to learn about the process. *Id*.
- Arbitration, however, is fair if it meets five criteria. *Johnson v. LM Corp*.
  - First, the arbitrators must be neutral. *Id*.
    - The arbitration provision proposed by Struckman, however, is silent on this score.
    - At a minimum, any agreement to arbitrate must provide that the arbitrators must disclose any conflicts of interest that would compromise neutrality.
    - Examinees should underscore for Struckman the need to ensure arbitrator neutrality, especially regarding the need to disclose conflicts of interest.
    - In *Johnson*, the court observed that the Franklin Arbitration Association (which was to conduct the arbitration in that case) was well-respected and required its arbitrators to disclose any conflicts of interest. Examinees

might encourage Struckman to designate the Franklin Arbitration Association as the arbitrator in fee disputes.

- Second, arbitration must provide for more than minimal discovery.
    - Struckman's proposed arbitration provision, however, is silent on this score, too.
    - Examinees should state that the arbitration to be used by Struckman must contain a provision for some form of discovery, though it need not provide for the full panoply of discovery offered by the courts. It will be sufficient if the parties can engage in some form of discovery sufficient to prepare for the arbitration hearing and have the ability to ask for additional discovery if they can demonstrate the need for it. *Johnson.*
- Third, the arbitrators must issue a written, reasoned decision. *Id*.
    - The arbitration provision proposed by Struckman does not address this.
    - Examinees should advise Struckman that her proposed arbitration provision must require a written decision giving reasons for the decision. The fact that Franklin law requires a written decision may be enough to ensure that such a decision will be issued. *Id.*
- Fourth, the arbitrators must be authorized to award any relief available through the courts and must be aware of such authority. *Id.*
    - Struckman's proposed arbitration provision, however, is silent on this score too.
    - Examinees should advise Struckman that either the retainer agreement or the materials describing the arbitration procedure should specify that the arbitrator is authorized to award the same relief that would be available through the courts.
- Fifth, the client may not be required to pay unreasonable fees or costs as a condition of access to the arbitral forum. *Id*.
    - The arbitration provision proposed by Struckman does not mention fees.
    - Examinees should conclude that Struckman's proposed arbitration should require existing clients to pay moderate fees and costs.

More observant examinees may note that Struckman desires a dispute resolution process that is quick and has minimal costs for her and her clients. With regard to fee disputes, in discussing the requirements to be fair and reasonable, examinees should avoid the tendency to recommend procedures that more than satisfy the fairness part, but are also costly or time-consuming. They should, instead, identify those that meet the requirements while being cost- and time-effective.

III. Conclusion

Examinees should conclude that Struckman may ethically seek to modify her retainer agreements with existing clients to include a provision requiring binding arbitration of future fee disputes in exchange for forgoing annual increases in fees for two years as currently provided for in the retainer agreement, but only if certain conditions are met. Examinees should similarly conclude that any resulting modification would be legally enforceable, but again, only if certain conditions are met.

February 2014 MPT:
In re Peterson Engineering Consultants

File

Lennon, Means, and Brown LLC
Attorneys at Law
249 S. Oak Street
Franklin City, Franklin 33409

TO: Examinee
FROM: Brenda Brown
DATE: February 25, 2014
RE: Peterson Engineering Consultants

Our client, Peterson Engineering Consultants (PEC), seeks our advice regarding issues related to its employees' use of technology. PEC is a privately owned, non-union engineering consulting firm. Most of its employees work outside the office for over half of each workday. Employees need to be able to communicate with one another, the home office, and clients while they are working outside the office, and to access various information, documents, and reports available on the Internet. PEC issues its employees Internet-connected computers and other devices (such as smartphones and tablets), all for business purposes and not for personal use.

After reading the results of a national survey about computer use in the workplace, the president of PEC became concerned regarding the risk of liability for misuse of company-owned technology and loss of productivity. While the president knows that, despite PEC's policies, its employees use the company's equipment for personal purposes, the survey alerted her to problems that she had not considered.

The president wants to know what revisions to the company's employee manual will provide the greatest possible protection for the company. After discussing the issue with the president, I understand that her goals in revising the manual are (1) to clarify ownership and monitoring of technology, (2) to ensure that the company's technology is used only for business purposes, and (3) to make the policies reflected in the manual effective and enforceable.

I attach relevant excerpts of PEC's current employee manual and a summary of the survey. I also attach three cases that raise significant legal issues about PEC's policies. Please prepare a memorandum addressing these issues that I can use when meeting with the president.

Your memorandum should do the following:

(1) Explain the legal bases under which PEC could be held liable for its employees' use or misuse of Internet-connected (or any similar) technology.

(2) Recommend changes and additions to the employee manual to minimize liability exposure. Base your recommendations on the attached materials and the president's stated goals. Explain the reasons for your recommendations but do not redraft the manual's language.

PETERSON ENGINEERING CONSULTANTS

EMPLOYEE MANUAL
Issued April 13, 2003

Phone Use

Whether in the office or out of the office, and whether using office phones or company-owned phones given to employees, employees are not to incur costs for incoming or outgoing calls unless these calls are for business purposes. Employees may make calls for incidental personal use as long as they do not incur costs.

Computer Use

PEC employees given equipment for use outside the office should understand that the equipment is the property of PEC and must be returned if the employee leaves the employ of PEC, whether voluntarily or involuntarily.

Employees may not use the Internet for any of the following:

- engaging in any conduct that is illegal
- revealing non-public information about PEC
- engaging in conduct that is obscene, sexually explicit, or pornographic in nature

PEC may review any employee's use of any company-owned equipment with access to the Internet.

Email Use

PEC views electronic communication systems as an efficient and effective means of communication with colleagues and clients. Therefore, PEC encourages the use of email for business purposes. PEC also permits incidental personal use of its email system.

* * *

NATIONAL PERSONNEL ASSOCIATION

RESULTS OF 2013 SURVEY CONCERNING COMPUTER USE AT WORK

Executive Summary of the Survey Findings

1. Ninety percent of employees spend at least 20 minutes of each workday using some form of social media (e.g., Facebook, Twitter, LinkedIn), personal email, and/or texting. Over 50 percent spend two or more of their working hours on social media every day.

2. Twenty-eight percent of employers have fired employees for email misuse, usually for violations of company policy, inappropriate or offensive language, or excessive personal use, as well as for misconduct aimed at coworkers or the public. Employees have challenged the firings based on various theories. The results of these challenges vary, depending on the specific facts of each case.

3. Over 50 percent of all employees surveyed reported that they spend some part of the workday on websites related to sports, shopping, adult entertainment, games, or other entertainment.

4. Employers are also concerned about lost productivity due to employee use of the Internet, chat rooms, personal email, blogs, and social networking sites. Employers have begun to block access to websites as a means of controlling lost productivity and risks of other losses.

5. More than half of all employers monitor content, keystrokes, time spent at the keyboard, email, electronic usage data, transcripts of phone and pager use, and other information.

While a number of employers have developed policies concerning ownership of computers and other technology, the use thereof during work time, and the monitoring of computer use, many employers fail to revise their policies regularly to stay abreast of technological developments. Few employers have policies about the ways employees communicate with one another electronically.

February 2014 MPT:
In re Peterson Engineering Consultants

Library

Hogan v. East Shore School

Franklin Court of Appeal (2013)

East Shore School, a private nonprofit entity, discharged Tucker Hogan, a teacher, for misuse of a computer provided to him by the school. Hogan sued, claiming that East Shore had invaded his privacy and that both the contents of the computer and any electronic records of its contents were private. The trial court granted summary judgment for East Shore on the ground that, as a matter of law, Hogan had no expectation of privacy in the computer. Hogan appeals. We affirm.

Hogan relies in great part on the United States Supreme Court opinion in *City of Ontario v. Quon*, 560 U.S. 746 (2010), which Hogan claims recognized a reasonable expectation of privacy in computer records.

We note with approval Justice Kennedy's observation in *Quon* that "rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one *amici* brief notes, many employers expect or at least tolerate personal use of such equipment because it often increases worker efficiency." We also bear in mind Justice Kennedy's apt aside that "[t]he judiciary risk error by elaborating too fully on the . . . implications of emerging technology before its role in society has become clear." *Quon*.

The *Quon* case dealt with a government employer and a claim that arose under the Fourth Amendment. But the Fourth Amendment applies only to public employers. Here, the employer is a private entity, and Hogan's claim rests on the tort of invasion of privacy, not on the Fourth Amendment.

In this case, the school provided a computer to each teacher, including Hogan. A fellow teacher reported to the principal that he had entered Hogan's classroom after school hours when no children were present and had seen what he believed to be an online gambling site on Hogan's computer screen. He noticed that Hogan immediately closed the browser. The day following the teacher's report, the principal arranged for an outside computer forensic company to inspect the computer assigned to Hogan and determine whether Hogan had been visiting online gambling sites. The computer forensic company determined that someone using the computer and Hogan's password had visited such sites on at least six occasions in the past two weeks, but that those sites had been deleted from the computer's browser history. Based on this report, East Shore discharged Hogan.

Hogan claimed that East Shore invaded his privacy when it searched the computer and when it searched records of past computer use. The tort of invasion of privacy occurs when a party intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, if the intrusion would be highly offensive to a reasonable person.

East Shore argued that there can be no invasion of privacy unless the matter being intruded upon is private. East Shore argued that there is no expectation of privacy in the use of a computer when the computer is owned by East Shore and is issued to the employee for school use only. East Shore pointed to its policy in its employee handbook, one issued annually to all employees, that states:

> East Shore School provides computers to teachers for use in the classroom for the purpose of enhancing the educational mission of the school. The computer, the computer software, and the computer account are the property of East Shore and are to be used solely for academic purposes. Teachers and other employees may not use the computer for personal purposes at any time, before, after, or during school hours. East Shore reserves the right to monitor the use of such equipment at any time.

Hogan did not dispute that the employee policy handbook contained this provision, but he argued that it was buried on page 37 of a 45-page handbook and that he had not read it. Further, he argued that the policy regarding computer monitoring was unclear because it failed to warn the employee that East Shore might search for information that had been deleted or might use an outside entity to conduct the monitoring. Next, he argued that because he was told to choose a password known only to him, he was led to believe that websites accessed by him using that password were private. Finally, he argued that because East Shore had not conducted any monitoring to date, it had waived its right to monitor computer use and had established a practice of respect for privacy. These facts, taken together, Hogan claimed, created an expectation of privacy.

Perhaps East Shore could have written a clearer policy or could have had employees sign a statement acknowledging their understanding of school policies related to technology, but the existing policy is clear. Hogan's failure to read the entire employee handbook does not lessen the clarity of the message. Perhaps East Shore could have defined what it meant by "monitoring" or could have warned employees that deleted computer files may be searched, but Hogan's failure to appreciate that the school might search deleted files is his own failure. East Shore drafted and published to its employees a policy that clearly stated that the computer, the computer software, and the computer account were the property of East Shore, and that East Shore reserved the right to monitor the use of the computer at any time.

Hogan should not have been surprised that East Shore searched for deleted files. While past practice might create a waiver of the right to monitor, there is no reason to believe that a waiver was created here, when the handbook was re-issued annually with the same warning that East Shore reserved the right to monitor use of the computer equipment. Finally, a reasonable person would not believe that the password would create a privacy interest, when the school's policy, read as a whole, offers no reason to believe that computer use is private.

In short, Hogan's claim for invasion of privacy fails because he had no reasonable expectation of privacy in the computer equipment belonging to his employer.

Affirmed.

Fines v. Heartland, Inc.

Franklin Court of Appeal (2011)

Ann Fines sued her fellow employee, John Parr, and her employer, Heartland, Inc., for defamation and sexual harassment. Each cause of action related to electronic mail messages (emails) that Parr sent to Fines while Parr, a Heartland sales representative, used Heartland's computers and email system. After the employer learned of these messages and investigated them, it discharged Parr. At trial, the jury found for Fines and against defendants Parr and Heartland and awarded damages to Fines. Heartland appeals.

In considering Heartland's appeal, we must first review the bases of Fines's successful claims against Parr.

In emails sent to Fines, Parr stated that he knew she was promiscuous. At trial Fines testified that after receiving the second such email from Parr, she confronted him, denied that she was promiscuous, told him she had been happily married for years, and told him to stop sending her emails. She introduced copies of the emails that Parr sent to coworkers after her confrontation with him, in which Parr repeated on three more occasions the statement that she was promiscuous. He also sent Fines emails of a sexual nature, not once but at least eight times, even after she confronted him and told him to stop, and Fines found those emails highly offensive. There was sufficient evidence for the jury to find that Parr both defamed and sexually harassed Fines.

We now turn to Heartland's arguments on appeal that it did not ratify Parr's actions and that it should not be held vicariously liable for his actions.

An employer may be liable for an employee's willful and malicious actions under the principle of ratification. An employee's actions may be ratified after the fact by the employer's voluntary election to adopt the employee's conduct by, in essence, treating the conduct as its own. The failure to discharge an employee after knowledge of his or her wrongful acts may be evidence supporting ratification. Fines claims that because Heartland delayed in discharging Parr after learning of his misconduct, Heartland in effect ratified Parr's behavior.

The facts as presented to the jury were that Fines did not complain to her supervisor or any Heartland representative until the end of the fifth day of Parr's offensive behavior, when Parr sent the emails to coworkers. When her supervisor learned of Fines's complaints, he confronted Parr. Parr denied the charges, saying that someone else must have sent the emails from his account. The supervisor reported the problem to a Heartland vice president, who consulted the company's information technology (IT) department. By day eight, the IT department confirmed that the emails had been sent from Parr's computer using the password assigned to Parr during the time Parr was in the office. Heartland fired Parr.

Such conduct by Heartland does not constitute ratification. Immediately upon learning of the complaint, a Heartland supervisor confronted the alleged sender of the emails, and when the employee denied the charges, the company investigated further, coming to a decision and taking action, all within four business days.

Next, Fines asserted that Heartland should be held liable for Parr's tortious conduct under the doctrine of respondeat superior. Under this doctrine, an employer is vicariously liable for its employee's torts committed within the scope of the employment. To hold an employer vicariously liable, the plaintiff must establish that the employee's acts were committed within the scope of the employment. An employer's vicarious liability may extend to willful and malicious torts. An employee's tortious act may be within the scope of employment even if it contravenes an express company rule.

But the scope of vicarious liability is not boundless. An employer will not be held vicariously liable for an employee's malicious or tortious conduct if the employee *substantially* deviates from the employment duties for personal purposes. Thus, if the employee "inflicts an injury out of personal malice, not engendered by the employment" or acts out of "personal malice unconnected with the employment," the employee is not acting within the scope of employment. *White v. Mascoutah Printing Co.* (Fr. Ct. App. 2010); RESTATEMENT (THIRD) OF AGENCY § 2.04.

Heartland relied at trial on statements in its employee handbook that office computers were to be used only for business and not for personal purposes. The Heartland handbook also stated that use of office equipment for personal purposes during office hours constituted misconduct for which the employee would be disciplined. Heartland thus argued that this provision put employees on notice that certain behavior was not only outside the scope of their employment but was an offense that could lead to being discharged, as happened here.

Parr’s purpose in sending these emails was purely personal. Nothing in Parr’s job description as a sales representative for Heartland would suggest that he should send such emails to coworkers. For whatever reason, Parr seemed determined to offend Fines. The mere fact that they were coworkers is insufficient to hold Heartland responsible for Parr’s malicious conduct. Under either the doctrine of ratification or that of respondeat superior, we find no basis for the judgment against Heartland.

Reversed.

Lucas v. Sumner Group, Inc.

Franklin Court of Appeal (2012)

After Sumner Group, Inc., discharged Valerie Lucas for violating Sumner's policy on employee computer use, Lucas sued for wrongful termination. The trial court granted summary judgment in favor of Sumner Group. Lucas appeals. For the reasons stated below, we reverse and remand.

Sumner Group's computer-use policy stated:

> Computers are a vital part of our business, and misuse of computers, the email systems, software, hardware, and all related technology can create disruptions in the work flow. All employees should know that telephones, email systems, computers, and all related technologies are company property and may be monitored 24 hours a day, 7 days a week, to ensure appropriate business use. The employee has no expectation of privacy at any time when using company property.
>
> Unauthorized Use: Although employees have access to email and the Internet, these software applications should be viewed as company property. The employee has no expectation of privacy, meaning that these types of software should not be used to transmit, receive, or download any material or information of a personal, frivolous, sexual, or similar nature. Employees found to be in violation of this policy are subject to disciplinary action, up to and including termination, and may also be subject to civil and/or criminal penalties.

Sumner Group discovered that over a four-month period, Lucas used the company Internet connection to find stories of interest to her book club and, using the company computer, composed a monthly newsletter for the club, including summaries of the articles she had found on the Internet. She then used the company's email system to distribute the newsletter to the club members. Lucas engaged in some but not all of these activities during work time, the remainder during her lunch break. Lucas admitted engaging in these activities.

She first claimed a First Amendment right of freedom of speech to engage in these activities. The First Amendment prohibits Congress, and by extension, federal, state, and local governments, from restricting the speech of employees. However, Lucas has failed to demonstrate any way in which the Sumner Group is a public employer. This argument fails.

Lucas also argued that the Sumner Group had abandoned whatever policy it had posted because it was common practice at Sumner Group for employees to engage in personal use of email and the Internet. In previous employment matters, this court has stated that an employer may be assumed to have abandoned or changed even a clearly written company policy if it is not enforced or if, through custom and practice, it has been effectively changed to permit the conduct forbidden in writing but permitted in practice. Whether Sumner Group has effectively abandoned its written policy by custom and practice is a matter of fact to be determined at trial.

Lucas next argued that the company policy was ambiguous. She claimed that the language of the computer-use policy did not clearly prohibit personal use. The policy said that the activities "should not" be conducted, as opposed to "shall not."[1] Therefore, she argued that the policy did not ban personal use of the Internet and email; rather, it merely recommended that those activities not occur. She argued that "should" conveys a moral goal while "shall" refers to a legal obligation or mandate.

In *Catts v. Unemployment Compensation Board* (Fr. Ct. App. 2011), the court held unclear an employee policy that read: "Madison Company has issued employees working from home laptops and mobile phones that should be used for the business of Madison Company." Catts, who had been denied unemployment benefits because she was discharged for personal use of the company-issued computer, argued that the policy was ambiguous. She argued that the policy could mean that employees were to use only Madison Company–issued laptops and phones for Madison Company business, as easily as it could mean that the employees were to use the Madison Company equipment only for business reasons. She argued that the company could

[1] This court has previously viewed with approval the suggestion from PLAIN ENGLISH FOR LAWYERS that questions about the meanings of "should," "shall," and other words can be avoided by pure use of "must" to mean "is required" and "must not" to mean "is disallowed."

prefer that employees use company equipment, rather than personal equipment, for company business because the company equipment had anti-virus software and other protections against "hacking." The key to the *Catts* conclusion was not merely the use of the word "should" but rather the fact that the entire sentence was unclear.

Thus the question here is whether Sumner Group's policy was unclear. When employees are to be terminated for misconduct, employers must be as unambiguous as possible in stating what is prohibited. Nevertheless, employers are not expected to state their policies with the precision of criminal law. Because this matter will be remanded to the trial court, the trial court must further consider whether the employee policy was clear enough that Lucas should have known that her conduct was prohibited.

Finally, Lucas argued that even if she did violate the policy, she was entitled to progressive discipline because the policy stated, "Employees found to be in violation of this policy are subject to disciplinary action, up to and including termination . . . ." She argued that this language meant that she should be reprimanded or counseled or even suspended *before* being terminated. Lucas misread the policy. The policy was clear. It put the employee on notice that there would be penalties. It specified a variety of penalties, but there was no commitment or promise that there would be progressive discipline. The employer was free to determine the penalty.

Reversed and remanded for proceedings consistent with this opinion.

February 2014 MPT:
In re Peterson Engineering Consultants

Point Sheet

This February 2014 MPT Point Sheet was provided to bar examiners to assist in grading the examination. It addresses the factual and legal points encompassed within the MPT. While it is illustrative of the discussions that might have appeared in excellent responses constructed by examinees, it is more detailed than examinee responses were expected to be.

DRAFTERS' POINT SHEET

The task for examinees in this performance test is to draft a memorandum to the supervising attorney to be used to advise the president of Peterson Engineering Consultants (PEC) concerning the company's policies on employee use of technology. PEC is a privately owned, non-union firm in which most employees work outside the office for part of the day. Employees are issued Internet-connected computers and other similar devices to carry out their duties and communicate with one another, the office, and clients. The current employee manual addressing use of these devices was issued in 2003, and the president wants to update it with an eye to revisions that will provide the greatest possible protection for PEC. In particular, the president has identified three goals in revising the manual: (1) to clarify ownership and monitoring of technology, (2) to ensure that the company's technology is used only for business purposes, and (3) to make the policies reflected in the manual effective and enforceable.

The File contains the task memorandum from the supervising attorney, relevant excerpts from PEC's current employee manual, and a summary of a survey about use of technology in the workplace. The Library includes three Franklin Court of Appeal cases.

The task memorandum instructs examinees to consider "Internet-connected (or any similar) technology." This terminology is purposefully used to avoid the need for constantly updating the employee manual to reflect whatever technology is current. Examinees may identify specific technology in use at the time of the exam, but it is not necessary to do so.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

Examinees' memorandum to the supervising attorney should accomplish two things:

(1) Explain the legal bases under which PEC could be held liable for its employees' use or misuse of Internet-connected (or any similar) technology.

(2) Recommend changes and additions to the employee manual to minimize PEC's liability exposure based on the president's stated goals and the attached materials. Examinees are instructed to explain the reasons for their recommendations but not to redraft the manual's language.

No organizational format is specified, but examinees should clearly frame their analysis of the issues. In particular, they should separate their analyses of the two tasks listed above.

II. DISCUSSION

A. Legal bases under which PEC could be held liable for its employees' use or misuse of Internet-connected (or any similar) technology

Employers may be liable for their employees' use or misuse of technology under either the theory of ratification or the theory of vicarious liability. Employee misconduct, such as sexual harassment or defamation, could result in employer liability to other employees or third parties. *Fines v. Heartland, Inc.* On the other hand, employers may be vulnerable to claims brought by an employee for invasion of privacy and/or wrongful discharge unless employers take steps to avoid that liability. *Hogan v. East Shore School; Lucas v. Sumner Group, Inc.*

- *Ratification.* An employer may be liable for an employee's willful or malicious misconduct after the fact if the employer ratifies the employee's conduct by the employer's voluntary election to adopt the conduct as its own. The failure to discipline an employee after knowledge of his or her wrongful acts may be evidence supporting ratification. *Fines v. Heartland, Inc*. For example, if an employer learns that an employee is sending harassing emails or posting defamatory blog entries about a coworker and does nothing about it, it could be argued that the employer ratified the employee's conduct and so is liable in tort to those injured as a result of the employee's conduct.
- *Vicarious liability or respondeat superior.* An employer is vicariously liable for its employees' torts committed within the scope of the employment. This includes not only an employee's negligent acts, but could extend to an employee's willful and malicious torts, even if such acts contravene an express company rule. *Fines.* For example, an employer may be liable in tort for the actions of an employee who texts information that invades the privacy of a coworker. This could be true even if the employer prohibits that very type of misconduct.
    - However, the employer's vicarious liability is not unlimited. Employers will not be liable for an employee's tortious or malicious conduct if the employee substantially deviates from the employment duties for personal purposes. Thus, if an employee inflicts an injury out of personal malice unconnected with the employment, the employer will not be liable. *Fines*.

- *Invasion of privacy.* Unless the employer is clear and unambiguous about ownership of the equipment and records of use of the equipment and about its right to monitor that use, it may be liable for invasion of its employees' privacy. Clarity in the employee manual about the ownership and right to monitor use of technology can forestall any claims by an employee that he or she has any privacy interest in activities conducted on/with technology owned or issued by the employer.
  - Examinees should recognize that there can be no invasion of privacy unless there is an expectation of privacy. *Hogan v. East Shore School*. Thus in *Hogan*, the court rejected an employee's claim that a search of the Internet browsing history (including deleted files) on his work computer invaded his privacy. The employee manual plainly stated that the employer, a private school, owned the computer, the software, etc., that the equipment was not to be used for personal purposes, and that the school reserved the right to monitor use of the equipment.
  - In addition, the *Hogan* court rejected the employee's claim that because the school had not previously monitored computer use, it had waived the right to do so and had "established a practice of respect for privacy." The school's prohibition on personal use was clearly stated in the manual, and it was unreasonable to conclude, in light of the bar on personal use, that use of a personal password had created a privacy right.
- *Wrongful discharge.* Unless the employer is clear about its policies and consistently enforces them, and is clear about its disciplinary procedures for failure to comply with the policies, it may be liable for wrongful discharge (also referred to as "wrongful termination"). In *Lucas v. Sumner Group, Inc.*, the employee admitted violating company policy prohibiting personal use of the Internet, but claimed that there was an expectation of progressive discipline and sued for wrongful termination. The court found that the employee manual expressly provided for disciplinary action, including the possibility of termination for those violating the policy. Thus the language in the manual was sufficient to put the employee on notice as to the possibility of being discharged; while penalties short of discharge were mentioned, there was no promise of progressive discipline.

B. Changes and additions to the employee manual that will minimize liability exposure and that incorporate the president's stated goals

The second component of examinees' task is to carefully read PEC's current employee policies and then recommend what revisions are needed to minimize liability arising from employee misconduct as well as those that address the president's goals of emphasizing PEC's ownership of the technology, ensuring that such technology is to be used only for business purposes, and making the policies reflected in the manual effective and enforceable.

The current manual is ineffective in what it fails to do, rather than in what it does; it has not been updated since 2003 and is quite out of date. In *City of Ontario v. Quon* (cited in *Hogan*), Justice Kennedy observed the reluctance of the courts to risk error by elaborating too fully on the implications of emerging technology. This reluctance argues in favor of employers such as PEC ensuring that their policies are kept current. Note that examinees are expressly directed not to redraft the manual's language. Also, as there is no format specified, examinees may present their suggestions in different ways: bulleted list, numbered items, or a general discussion of deficiencies in the current manual.

- The client's first goal is to clarify ownership and monitoring of technology. PEC's manual addresses only phone use, computer use, and email use. Because PEC is likely to issue new equipment at any time as technology changes, the manual needs to be rewritten to include *all* technology. In *Lucas*, the employer used the term "all related technologies," a term that is more inclusive and provides for advances in technology.
    - The current manual is ineffective because it fails to make clear that PEC owns the computer software and records of the use of the software, including records of deleted materials; fails to warn against any belief that a privacy interest exists in the use of the technology, including the mistaken belief that use of passwords creates an expectation of privacy; uses the term "given," which may be ambiguous; addresses only ownership of equipment intended for use outside the office and not all equipment, wherever it is used; and identifies only certain types of equipment. In addition, the current manual fails to warn that PEC (or third parties contracted by PEC) will monitor use of the technology, and that it will monitor current, past, and deleted use as well. *Hogan*.
    - PEC must make clear that it owns the technology, including the equipment itself, any software, and any records created by use of the technology, including any

electronic record of deleted files; that it will monitor use of the technology; and that use of employee-specific passwords does not affect PEC's ownership rights or create any implied expectation of privacy.

    - Taking these steps should bring PEC's manual into compliance with the ruling in *Hogan*.
    - Likewise, PEC must make clear that it will monitor employee use of its equipment through any number of methods (e.g., review of data logs, browser histories, etc.), even if a third party does the monitoring. For example, in *Hogan*, the court found no invasion of privacy, even when a computer forensic company was hired to search the files on the employee's computer, because the employee manual stated that the school reserved the right to monitor the equipment. Also, in *Hogan*, the court rejected the employee's argument that using a private password created a privacy interest.
    - PEC need not be concerned about any Fourth Amendment restriction on its ability to monitor because PEC is not a public entity. *Hogan.*

- The president's second goal is to ensure that the company's technology is used only for business purposes. While some employers may permit some limited personal use as noted in the Survey, PEC's president has indicated a goal of establishing a bright-line rule prohibiting any non-business use of its technology. Here, the current employee manual is inconsistent with the president's goal in several ways:
    - Most obviously, it expressly permits use of technology for personal purposes.
        - Although the policy states that employees are not to incur costs for incoming or outgoing calls unless the calls are for business purposes, it goes on to state that personal calls are fine as long as no cost to PEC is incurred.
        - The policy permits incidental personal use of PEC's email system by employees. First, what constitutes "incidental personal use" is ambiguous. Second, by allowing a certain amount of personal use, this section of the manual may support a ratification or waiver argument. At a minimum, this sentence in the manual should be eliminated.

- The manual's limitation on Internet use is open to interpretation. As written, it states that employees may not use the Internet for certain purposes: illegal conduct, revealing non-public information, or "conduct that is obscene, sexually explicit, or pornographic in nature."
  - By covering only use of the Internet, and not use of the other technology likely available such as email, tablets, or smartphones, the manual may be read to permit personal use of non-listed items. And by listing certain prohibited conduct and not *all* non-business conduct (e.g., online gambling), the manual may implicitly condone conduct not specifically prohibited.
  - In sum, by identifying some forms of technology, the manual may suggest that other forms may be used for personal purposes. Likewise, by identifying some prohibited forms of use, the manual suggests that some other forms of personal use *are* allowed.
- There is no question that PEC has the right to limit use of its technology to business purposes. *See Lucas; Fines; Hogan* (employee policy permitted use of school computers only for academic purposes). PEC need not be concerned about First Amendment implications because the First Amendment applies only to public entities, and PEC is a private entity. *See Lucas*.
- In redrafting the manual, PEC must make its prohibition against personal use clear and unambiguous. The prohibition should be conspicuously displayed. This will help avoid results such as in *Catts v. Unemployment Compensation Board* (cited in *Lucas*), in which the court found that the policy manual was not clear that no personal use was permitted. Rather, the language permitted two ways to read the policy—that for company business, employees were to use only the company's computer, or that employees were to use the company computer only for business reasons.
  - PEC can increase the likelihood that its policies will be interpreted and applied as it intends if, in drafting a clear and unambiguous prohibition against personal use, PEC takes care to use "must not" rather than "shall not," "should not," or "may not." This is consistent with the footnote in *Lucas* approving use of mandatory, as opposed to permissive, language.

        - When revised, the manual should use more inclusive terms in referring to the forms of technology and should avoid itemizing certain kinds of devices but instead refer to all Internet-connected or similar technology.
    - As another means of limiting personal use of its equipment (and the related loss of productivity), PEC may consider blocking websites for shopping, social media, games, etc.

- The president's third goal is to make the policies reflected in the manual effective and enforceable. One key omission in the current manual is that there is no requirement that employees sign to acknowledge that they have received, read, and understood the policies in the manual. Nor does the manual provide for discipline for those employees who violate the policies.
    - To help protect itself from liability, PEC should have its employees sign a statement each year that they have read, understood, and agreed to abide by PEC's policies on technology. In *Hogan*, the court rejected an employee's claim that because the manual was lengthy, he had not read it and so was not bound by its terms. While the employer prevailed, it would have had an even stronger case if it could have pointed to the employee's signature as acknowledgment that he had read the computer-use policy.
    - The policy on employee use of Internet-connected computers and similar technology should be conspicuously placed in the manual.
    - PEC should review and, if needed, update the manual yearly. In *Hogan,* the manual was issued annually, and that may have helped to persuade the court that the employee was on notice of the school's policies.
    - Equally important is that PEC ensure that its supervisory employees know and enforce the policies consistently and avoid creating any exceptions or abandonment. For example, in *Lucas*, the employee argued that even though the written policy was clear that personal use of email and the Internet was prohibited, the employer had abandoned that policy because such use was permitted in practice.
    - Likewise, PEC must be careful not to waive the policy by inaction. In *Hogan*, the court rejected a claim that because the employer had never monitored computer

use, it had waived that right. To avoid the risk that the claim of abandonment or waiver might prevail, PEC must not only state its policy clearly in writing but must ensure that the policy is enforced and that all personnel understand that they may not create exceptions or ignore violations of the policy.

- PEC must be clear that it will discipline employees for violation of its policies. The manual must state that misuse of the technology will subject the employee to discipline and must not create an expectation of progressive discipline unless PEC intends to use that approach. *Lucas*.
- Additionally, to avoid liability for employees who ignore the policies, PEC needs to provide a means by which coworkers and others can complain about employee misuse of technology. PEC needs to adopt a policy of promptly investigating and acting on these complaints. *See Fines* (employer's prompt action on complaint defeated claim that it had ratified employee's misconduct).

Following the recommendations above will produce policies that clearly prohibit personal use and provide for discipline for those who violate the policies. At the same time, implementing these changes should insulate PEC against claims based on ratification, respondeat superior, invasion of privacy, or wrongful discharge.

July 2013 MPT: *Palindrome Recording Contract*

File

MORRIS & WESTMAN, LLP
2932 Sheffield Court
Franklin City, Franklin 33026

TO: Examinee
FROM: Levi Morris
DATE: July 30, 2013
RE: Palindrome Recording Contract

We have been retained to represent the members of the rock band Palindrome. The band has had considerable success in the tri-state area of Franklin, Columbia, and Olympia and has received an offer from Polyphon, an independent record label, which wants to sign the band to a long-term recording contract.

The contract submitted by Polyphon is complex and voluminous (it runs over 50 pages of single-spaced type). The band has asked us to negotiate the contract with the record label. There are some key provisions that we must redraft to meet the band's contractual desires. We can then present the redrafted contract to Polyphon, as a step in negotiating with the label. I am attaching the provisions from the contract Polyphon submitted that I would like you to look at. I have also attached other material to give you some background and from which you may glean the band's wishes and the applicable law. For your purposes, assume that the agreement among the various band members is a binding contract and that they have formed a valid partnership.

Please draft a memorandum in which you identify those contract provisions that need to be redrafted to meet the band's wishes and to comply with the law. For each provision that you identify,

1. redraft the provision, indicating your changes from the original text, and

2. explain the reasons for your redraft, including the legal reasons (if any) for changing the provision, to guide me in conducting the negotiations over these points.

Transcript of Interview between Levi Morris and Otto Smyth (July 12, 2013)

Levi Morris: Otto, it's good to see you. How are things going?

Otto Smyth: Great, really great. As I told you over the phone, we've got a mega-offer from Polyphon to sign with them, and the band asked me to take the lead in negotiating.

Morris: Excellent. What's Polyphon's offer?

Smyth: We've had a few offers in the past, but from labels that wanted to take everything we had. We really want to sign with an independent label, because they treat artists like us better, and Polyphon has a reputation for treating artists reasonably and being willing to negotiate terms. They sent our manager this huge contract—here's a copy. We'll need your help to deal with them.

Morris: That's what we're here for. Bring me up-to-date on what's happening with the band.

Smyth: Well, as you may know, about nine months ago, Al, our bass player, was injured by a drunk driver. He's okay now, thank goodness. Abby, our lead guitarist, and Coco, our drummer, are still going strong, and, as leader of the group, I'm still playing rhythm guitar, singing lead vocals, and doing all the songwriting. Our fan base really has grown here in the tri-state area, and that must've gotten the attention of the label, because they really came after us hard.

Morris: How do the members of the band get on as far as business arrangements go?

Smyth: We're fine together—when we first formed 10 years ago or so, we made an agreement among ourselves which I cobbled up out of a music book I read. Here's a copy. We do business as a partnership under the name Palindrome Partners, and everything we make has to go through the partnership into a partnership bank account. We then divide up the money in accordance with our partnership agreement.

Morris: Thanks. We'll look the agreement over. Let's turn to the label's offer, and—first things first—how's the money?

[*Discussion of financial terms of advance and royalties offered by label omitted*.]

Morris: Now, what else do you want us to negotiate with them?

Smyth: Well, I'm not really sure what's in there—I really don't understand this legal stuff. But we're all pretty much in agreement over some things that are important to us. First, we don’t want to be tied up with the label for too long unless they really do a good job for us—maybe for three albums at most, and only for four years.

Second, our artistic integrity is really important—we’ve got to make all the artistic decisions about the songs that go into our albums, and the recordings, and the producer we want, and what gets released.

Third, since Al nearly died because of that drunk driver, we’ve become fanatic about drugs and booze—we’ve sworn off, and we owe it to him to get the message out. We’d hate it if our music didn’t get that message across, or worse, if people thought we were the stereotypical drink-and-dope rockers, or if our songs were used in, like, a beer commercial. I never want to see a picture of me in some magazine holding a bottle.

Morris: Understood—we’ll try to make sure that you have the right to approve of marketing and promotional efforts. You know, my daughter loves your band and wears a Palindrome T-shirt she got at one of your concerts.

Smyth: Yeah, we make a nice amount from our merchandise sales. At every show we do, and on our website, we sell T-shirts, baseball caps, tank tops, stuff like that.

Morris: Who makes them for you?

Smyth: Our manager found the various manufacturers. We’re really careful to treat our fans well and give them good value for their money, using top-quality materials, making sure the merchandise is high quality—like the T-shirts, we could use some cheap cotton blends and make a few bucks more, but instead we always use those thicker Ts, with high-quality fabric. We think that if we treat our fans well, they’ll stay loyal to us.

You know, we’ve been together for almost 10 years now, and we’ve always been careful of the Palindrome name and what it means to our fans. We’ve worked really hard to build it up to where it is now, and it means a lot to us. We put our name on every piece of merchandise we have. Our manager even got a registered trademark for us in our name, and she tells us that all of our merchandise deals are nonexclusive, which means we can license our name to more than one manufacturer. And we want to keep it that way. It’s really important to us to keep control of everything that has to do with our merchandise, and the money it brings in, because it’s a real source of income for us.

We understand that Polyphon is offering us a higher royalty rate for our records in exchange for a piece of our merchandise action, and that's OK with us—we'd be willing to give them a quarter of the revenue for the stuff they produce and sell—but we've got to keep that trademark, and we've got to be able to use it ourselves without cutting Polyphon in on money from products it doesn't make or sell.

Morris: So you wouldn't mind licensing your trademark to Polyphon?

Smyth: Not as long as we own it, can still do our own thing with it, and can control what they do with it.

Morris: We'll see to that. We don't have to itemize the things they can produce; we just have to be sure that you can approve of what they make and the quality of it as well.

[*Discussion of other points omitted*.]

AGREEMENT AMONG MEMBERS OF PALINDROME

AGREEMENT, by and between Otto Smyth, Abby Thornton, Coco Hart, and Al Laurence (collectively, "the Band"), all citizens of the United States of America and the State of Franklin, as follows:

WHEREAS, the individual members of the Band have formed a musical group known professionally as Palindrome; and

WHEREAS, the individual members of the Band wish to set forth the terms of their affiliation;

NOW, THEREFORE, the individual members of the Band agree as follows:

1. All property created by the Band as a collective entity (including both intellectual and material property) shall be jointly owned by all members of the Band. All income earned by the Band as a collective entity for its collective efforts or from that collective property (e.g., from recordings made as a musical group) will be divided equally among the individual members of the Band. Should any individual member of the Band voluntarily or involuntarily withdraw from the Band, that member will receive his or her proportionate share of income earned by the Band as a collective entity from undertakings made before that member's withdrawal from the Band.

2. All actions taken for the Band as an entity will require the unanimous approval of all the individual members of the Band.

3. The Band shall form a partnership and do business under the name Palindrome Partners.

Signed this 15th day of March, 2003.

______________________________	______________________________
Otto Smyth	Abby Thornton
______________________________	______________________________
Coco Hart	Al Laurence

Excerpts from Contract Presented by Polyphon

1. DEFINITIONS

"Album" shall mean a sufficient number of Masters embodying Artist's performances to comprise one (1) or more compact discs, or the equivalent, of not less than forty-five (45) minutes of playing time and containing at least ten (10) different Masters.

"Artist" or "you" shall mean each member of the band Palindrome, individually, and the band collectively.

"Contract Period" shall mean the term set forth in Paragraph 3.03.

"Master" shall mean any sound recording of a single musical composition, irrespective of length, that is intended to be embodied on or in an Album.

* * *

3. TERM AND DELIVERY OBLIGATIONS

3.01 During each Contract Period, you will deliver to Polyphon commercially satisfactory Masters. Such Masters will embody the featured vocal performances of Artist of contemporary selections that have not been previously recorded by Artist, and each Master will contain the performances of all members of Artist.

3.02 During each Contract Period, you will perform for the recording of Masters and you will deliver to Polyphon those Masters (the "Recording Commitment") necessary to meet the following schedule:

Contract Period	Recording Commitment
Initial Contract Period	one (1) Album
Each Option Period	one (1) Album

3.03 The initial Contract Period will begin on the date of this Agreement and will run for one year. You hereby grant Polyphon eight (8) separate options, each to extend the term of this Agreement for one additional Contract Period of one year per option ("Option Period"). In the event that you do not fulfill your Recording Commitment for the initial Contract Period or any Option Period, that period will continue to run and the next Option Period will not begin until the Recording Commitment in question has been fulfilled.

4. APPROVALS

4.01 Polyphon shall, in its sole discretion, make the final determination of the Masters to be included in each Album, and shall have the sole authority to assign one or more producers who shall collaborate with you on the production of each Master and each Album.

* * *

8. MERCHANDISE, MARKETING, AND OTHER RIGHTS

8.01 Artist warrants that it owns the federally registered trademark PALINDROME (Reg. No. 5,423,888) and hereby transfers all right, title, and interest in that trademark to Polyphon. Polyphon may use the trademark on such products as, in its sole discretion, it sees fit to produce or license, and all income from such use shall be Polyphon's alone.

8.02 Artist hereby authorizes Polyphon, in its sole discretion, to use Artist's, and each member of Artist's, name, image, and likeness in connection with any marketing or promotional efforts and to use the Masters in conjunction with the advertising, promotion, or sale of any goods or services.

July 2013 MPT:
Palindrome Recording Contract

Library

Franklin Statute re Personal Services Contracts

Franklin Labor Code § 2855

(a) Except as otherwise provided in subsection (b), a contract to render personal service may not be enforced against the employee or person contracting to render the service beyond five years from the commencement of service under it. If the employee or person contracting to render the service voluntarily continues to serve under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation due the employee or person rendering the service.

(b) Notwithstanding subsection (a), a contract to render personal service in the production of phonorecords in which sounds are first fixed may not be enforced against the employee or person contracting to render the service beyond 10 years from the commencement of service under it. For purposes of this subsection, a "phonorecord" shall mean all forms of audio-only reproduction, now or hereafter known, manufactured and distributed for home use.

Panama Hats of Franklin, Inc. v. Elson Enterprises, LLC

United States District Court (District of Franklin, 2004)

Panama Hats of Franklin, Inc., manufactures hats which it sells to the public. In 2000, it entered into an agreement with the Allied Hat Co., which owned a federally registered trademark in the word “Napoleon” for a style of men’s hat. Other than the financial terms, the only operative term of that agreement reads as follows: “Allied owns the federally registered trademark ‘Napoleon’ for men’s hats (Reg. No. 3,455,879). Allied hereby transfers that trademark to Panama for the monetary consideration set forth below.” The agreement did not make any other transfer of tangible or intangible property, good will, or business assets to Panama. Two years later, Allied went out of business—all its other assets have been liquidated, and it no longer has any legal (or other) existence.

In 2003, Elson Enterprises, LLC, a company unrelated to Panama or Allied, began manufacturing a style of men’s hat, which it marketed as the “Napoleon” style. Panama had never used the mark, but it sued Elson, claiming that it owned the federally registered trademark in the word “Napoleon” for hats by virtue of the assignment from Allied and that Elson had infringed that mark. Elson now moves for summary judgment, claiming that Panama has no interest in that trademark and so has no basis for a claim of trademark infringement against Elson.

The purpose of a trademark is clear from the definition of the term in the federal trademark statute: “The term ‘trademark’ includes any word, name, symbol, or device, or any combination thereof — (1) used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” 15 U.S.C. § 1127. Some examples of well-known trademarks are Coca-Cola, Exxon, and Sony.

From this it is apparent that the trademark cannot be divorced from the goods themselves—as the trademark is the assurance to the consumer of the source of the goods, the trademark cannot exist independently of the goods. Hence, if one company purchases the assets of another and becomes the manufacturer of the goods previously manufactured by the purchased company, the trademark that was associated with those goods may now become the property of, and be associated with, the new manufacturer of the goods, for the trademark is now the new manufacturer's indication of source. Short of a transfer of other assets of a business with the trademark, a trademark cannot be transferred without, at the very least, a simultaneous transfer of the good will associated with the mark, for that good will has developed from the actual product itself and so binds the trademark to the goods or services with which it is associated. In essence, the mark cannot exist in a vacuum, to be bought and sold as a freestanding property. This policy is made explicit in the federal trademark statute: "A registered mark . . . shall be assignable *with the good will of the business in which the mark is used, or with that part of the good will of the business connected with the use of and symbolized by the mark*." 15 U.S.C. § 1060(a)(1) (emphasis added).

In the parlance of the trademark law, the sale of a trademark without any other asset of the business—without, at the very least, the good will associated with the trademark—is termed an "assignment in gross" or a "naked" assignment of the trademark. Given the policy considerations set forth above, without the necessary inclusion of the assets of the business or the good will associated with the mark, the law holds that a "naked" "assignment in gross" of a trademark is not valid. Further, such a "naked" "assignment in gross" may cause the assignor to lose all rights in the trademark and leave the trademark open for acquisition by the first subsequent user of the mark in commerce.

Because the purported assignment of the federally registered trademark "Napoleon" from Allied to Panama was just such a "naked" "assignment in gross" of the mark, it has no validity—the purported assignment conveyed no rights. Because the assignment was invalid, the mark was free for anyone to acquire, and anyone could acquire the right to the mark by using the mark in commerce, which is precisely what Elson did. (Panama never used the mark.) Therefore, Elson did not infringe on any rights of Panama because Panama had no rights in the "Napoleon" trademark. Elson's motion for summary judgment is granted.

M&P Sportswear, Inc. v. Tops Clothing Co.

United States District Court (District of Franklin, 2001)

The facts giving rise to this lawsuit for trademark infringement, stripped to their essentials, are these: M&P Sportswear designs T-shirts and other items of apparel, and is the owner of the federally registered trademark "Go Baby," which it uses as the brand name of a line of T-shirts. Tops Clothing is an offshore manufacturer of clothing. In 1998, Tops entered into an agreement with M&P, under which M&P licensed the use of its "Go Baby" trademark to Tops. The agreement provided that Tops would pay a specified licensing fee to M&P, which would entitle Tops to manufacture, import into the United States, and sell T-shirts under the "Go Baby" brand. The agreement contained no other substantive provisions, and Tops immediately began the manufacture, importation, and sale of the T-shirts. Tops made the requisite licensing payments to M&P.

In 2000, M&P representatives purchased samples of Tops's "Go Baby" T-shirts at a "99-cent" store in Franklin City; this was the first sample of the Tops T-shirts M&P had obtained. M&P's representatives found that the T-shirts were, in their opinion, of the poorest quality imaginable—according to the deposition testimony of one of M&P's principals, "they were so thin and cheaply made that they would dissolve in a rainstorm." M&P then sent a purported "notice of termination" of the trademark license agreement to Tops (this notwithstanding that the license agreement did not make any specific provision for termination). When Tops continued to manufacture, import, and sell the branded T-shirts, M&P brought this action for trademark infringement against it. Tops now seeks summary judgment against M&P, on the ground that, as the license agreement contained no provisions for quality control, M&P no longer has any rights in the "Go Baby" trademark.

It is a basic tenet of trademark law that a trademark is an indication of the source or origin of goods or services to the public, enabling the public to expect that the goods or services bearing the trademark will comport with a certain uniform standard of quality, whatever that quality may be. A trademark carries with it a message that the trademark owner is controlling the nature and quality of the goods or services sold under the mark. Thus, not only does a trademark owner have the *right* to control quality—when it licenses, it has the *duty* to control quality.

Accordingly, it is also a basic tenet of the trademark law that any trademark proprietor who licenses the trademark to another must assure, in the license agreement, that the goods or services offered by the licensee meet the standards of quality of the trademarked goods established by the trademark proprietor. Failure to do so causes the mark to lose its significance as an indication of origin. Indeed, many Circuits have held that such action may be seen as an abandonment of the mark itself; the federal trademark act provides, "A mark shall be deemed 'abandoned' if either of the following occurs: . . . (2) when any course of conduct of the owner, including acts of omission as well as commission, causes the mark . . . to lose its significance as a mark." Uncontrolled licensing as a course of conduct is inherently deceptive, constitutes abandonment of all rights in the trademark, and results in cancellation of its registration.

Here, M&P made no quality-control provision whatsoever in its license agreement. Accordingly, by failing to assure the public of any standard of quality of the goods and services manufactured and sold under the mark, M&P has lost its rights to the mark.

Tops's motion for summary judgment is granted.

July 2013 MPT:
Palindrome Recording Contract

Point Sheet

This July 2013 MPT Point Sheet was provided to bar examiners to assist in grading the examination. It addresses the factual and legal points encompassed within the MPT. While it is illustrative of the discussions that might have appeared in excellent responses constructed by examinees, it is more detailed than examinee responses were expected to be.

DRAFTERS' POINT SHEET

In this performance test, examinees' law firm represents the four members of the rock band Palindrome, who have retained the firm to negotiate a recording contract with Polyphon, an independent recording label. Polyphon has presented the band with a detailed contract, and examinees are asked to redraft certain provisions of that contract to comport with the band's contractual demands.

Examinees are not only being asked to redraft those provisions, but also to explain why changes are being made to each, and to analyze legal aspects or complications involved with each provision, if there are any.

The File contains 1) the instructional memorandum, 2) a transcript of an interview by the assigning partner with the leader of the band, 3) an agreement among the members of the band concerning the division of income, and 4) selected provisions of the form contract submitted to the band by the record label. The Library contains 1) the text of Franklin's statute concerning contracts for personal services and 2) two cases bearing on legal issues concerning the assignment and licensing of trademarks.

The following discussion covers all the points the drafters intended to raise in the problem. Examinees need not cover them all to receive good grades.

I. FORMAT AND OVERVIEW

The assignment has two parts. For each provision in the given contract which conflicts with the band's wishes, examinees are to 1) redraft the provision and 2) explain why the provision was redrafted, giving the reasons for the language chosen and noting any legal issues presented by the provision or its redrafting, if such issues exist. Examinees thus must, first, discern which provisions need redrafting based on the band's wishes; this necessitates a careful and thorough reading of the contract provisions. Next, examinees must redraft those provisions from a purely contractual point of view for negotiation purposes; and, finally, explain the reasons for the redraft, including any legal issues presented.

Because this item is a drafting exercise, there are many ways of redrafting the relevant provisions to achieve the client's goals. Hence, the standard for grading should depend on the identification of the client's goals and the interaction of those goals with the contract's provisions, as much as on the particular language chosen by the examinee in his or her redraft.

Therefore, examinees should identify four provisions in the contract presented by Polyphon (referenced below by section number from the contract presented in the File) which conflict with the client's goals, should determine the impact (if any) of the statute and case law provided on those provisions, and should then redraft the provisions to comport with the law and achieve the client's goals, as follows:

1) Section 3.03, dealing with the length of the contract and the obligations under it: In the transcript of his interview with the assigning partner, the band leader has indicated that the proposed contract length is unacceptable and that the band wants a shorter length. In addition, Franklin's statute on personal service contracts must be considered.

2) Section 4.01, dealing with artistic control over the recordings: In the transcript of his interview with the assigning partner, the band leader has indicated that the band wants complete artistic control.

3) Section 8.01, dealing with the purported assignment of the band's trademark: Based on the transcript of the band leader's interview with the assigning partner, the band is willing only to grant the record label a nonexclusive license to use the trademark, wants 75% of the revenues from that licensing, and wants to maintain control over the quality standards for the products. In addition, the legal issues raised by the two cases dealing with trademark assignments and quality control of trademark licenses must be considered.

4) Section 8.02, dealing with the use of the band's images and trademarks for marketing purposes: Based on the transcript of the band leader's interview with the assigning partner, the band wants the right of approval over marketing and promotional uses.

Examinees will be expected to redraft each of these provisions and explain the reasons for the changes; further, examinees will be expected to note that those reasons include legal issues for the sections of the contract identified in items 1) and 3) above.

II. DISCUSSION

Given the specific instructions in the call memo, examinees should be able to organize their drafting and analyses easily. The following explanations give examples that are worded as they might be in an examinee's answer, but they are not to be construed as "model answers." New language in the redrafted sections is underlined and deleted language lined through.

Although examinees do not have to use the specific language given under each heading below, all the points that they might cover are listed.

A. SECTION 3.03 (Term of Agreement)

i. REDRAFTED LANGUAGE

3.03 The initial Contract Period will begin on the date of this Agreement and will run for one year. You hereby grant Polyphon ~~eight (8)~~ two (2) separate options, each to extend the term of this Agreement for one additional Contract Period of one year per option ("Option Period"). In the event that you do not fulfill your Recording Commitment for the initial Contract Period or any Option Period, that period will continue to run and the next Option Period will not begin until the Recording Commitment in question has been fulfilled; but, notwithstanding the above, in all events this Agreement shall terminate four (4) years from its commencement date.

ii. EXPLANATION

Palindrome wants the contract to require the production of three Albums at most. Hence, after the initial Contract Period (for which one Album is due), Polyphon should be granted only two more Option Periods, for a total of three Albums. Further, as Palindrome does not want the Agreement to run for more than four years, a clause limiting the total term of the contract to four years must be added.

This contractual provision involves Franklin Labor Code § 2855. That statute, in subsection (a), generally limits personal service contracts to five years. Polyphon's draft could last for nine years (the initial Contract Period of a year plus eight more Option Periods of a year each). While this seemingly violates subsection (a) of the statute, the exception to the statute in subsection (b) specifically refers to recording contracts such as this one and changes the 5-year limitation to a 10-year limitation. Thus, the negotiator will not be able to argue that, on its face, the provision as drafted by Polyphon violates the statute, but rather will have to make it a purely contractual negotiating point. However, perceptive examinees will also note that, as the contract automatically extends Option Periods beyond their one-year term if the promised Album is not delivered, there is a possibility that the contract will violate the statutory 10-year limitation if delivery of any Album is delayed by more than one year (thus turning the 9-year facial term of the contract to one exceeding 10 years). In addition, perceptive examinees will note that the limitation to an absolute four-year total term the band desires will supersede that automatic extension. Perceptive examinees might also note that if Polyphon accepts the band's term and exercises both options, but the band fails to deliver three Albums before the expiration of four years, the label might have a claim for damages against the band for the undelivered Albums, perhaps including the return of advances.

B. SECTION 4.01 (Artistic Control)

i. REDRAFTED LANGUAGE

4.01 ~~Polyphon~~ <u>Artist</u> shall, in its sole discretion, make the final determination of the Masters to be included in each Album, and shall have the sole authority to assign one or more producers who shall collaborate ~~with you~~ on the production of each Master and each Album.

ii. EXPLANATION

As the band members want complete artistic control over their recordings (including the right to choose their producers), this provision must be changed from giving Polyphon that control to giving Artist that control.

This is a straightforward change to make and should not present problems for examinees, provided they carefully read the contract language and recognize that simply substituting "Artist" for "Polyphon" is the easiest way to effect the client's wishes.

C. SECTION 8.01 (Trademark)

i. REDRAFTED LANGUAGE

8.01 Artist warrants that it owns the federally registered trademark PALINDROME (Reg. No. 5,423,888) and hereby ~~transfers all right, title, and interest in~~ <u>grants a nonexclusive license in</u> that trademark to Polyphon. Polyphon may use the trademark on such products as~~, in its sole discretion, it sees fit to produce or license, and~~ <u>may be approved by Artist, and which will meet standards of quality to be prescribed by Artist.</u> ~~all~~ <u>All</u> income from such use<u>s</u> <u>by Polyphon</u> shall be ~~Polyphon's alone~~ <u>divided as follows: seventy-five percent (75%) to Artist and twenty-five percent (25%) to Polyphon.</u>

ii. EXPLANATION

First, as held by *Panama Hats of Franklin, Inc. v. Elson Enterprises, LLC* (U.S. Dist. Fr. 2004), a "naked" assignment in gross of a trademark (i.e., one without at least an assignment of the good will associated with the trademark) is invalid and can lose trademark protection. Thus, Polyphon's draft provision is unacceptable, as it could be read to be just such a "naked" assignment in gross. (Perceptive examinees might note that it could nonetheless be argued that, given all the other terms of the agreement, the transfer of the trademark does include some substantive assets and good will, and so is not a "naked" assignment in gross.) Second, whether “naked” assignment or not, the band members are willing only to give a nonexclusive license of the trademark to Polyphon, such as the band has with other manufacturers. The license must be nonexclusive and this must be written into the agreement. Hence, the first sentence should be modified to account for these two points.

Next, the band wants to have the right of approval over the products Polyphon produces under the trademark license to ensure that the products are of the high quality that their fans have come to expect. Thus, that right of approval must be written into the agreement.

As held by *M&P Sportswear, Inc. v. Tops Clothing Co.* (U.S. Dist. Fr. 2001), a trademark license without quality control on the part of the trademark owner-licensor will also be invalid and can lose trademark protection. In *M&P Sportswear, Inc.*, M&P entered into a licensing agreement with Tops Clothing Co. to manufacture “Go Baby” T-shirts. “Go Baby” was a brand name of a line of T-shirts, and the trademark “Go Baby” was federally registered.

M&P’s agreement with Tops contained no provisions for quality control in Tops’s manufacturing process. M&P discovered that the T-shirts were of the “poorest quality imaginable” and tried to terminate the licensing agreement. Tops continued to manufacture and sell the “Go Baby” T-shirts. M&P sued for trademark infringement. The court granted Tops’s motion for summary judgment on the ground that M&P had lost its rights in the “Go Baby” mark when it failed to set any quality control standards for its licensee.

Here, then, the band must be given a right to set the quality standards for any merchandise produced using the Palindrome trademark. If it does not set quality standards, the band could lose control of the trademark. And the band wants to sell only high-quality merchandise to avoid sullying its reputation among its fans.

Finally, Polyphon’s draft would give Polyphon all the revenue from its use of the band’s trademark, which is unacceptable to the band. As the band is willing to give Polyphon one-quarter of the revenue from such uses (but only from Polyphon’s uses of the trademark, not from the band’s uses), that revenue division (75% to Palindrome, 25% to Polyphon) should be inserted into the provision and must be limited to revenues from Polyphon’s use of the trademark only. Perceptive examinees might seek to refine the broad term “revenues” by inserting the concepts of “gross revenue” or “net income.”

D. SECTION 8.02 (Use of Persona in Marketing Efforts)

i. REDRAFTED LANGUAGE

8.02 Artist hereby authorizes Polyphon~~, in its sole discretion,~~ to use Artist's, and each member of Artist's, name, image, and likeness in connection with any marketing or promotional efforts and to use the Masters in conjunction with the advertising, promotion, or sale of any goods or services, subject to Artist's approval.

ii. EXPLANATION

The band is extremely sensitive about the use of its image and songs in ways that it would find offensive because its bass player was seriously injured by a drunk driver and so the members of the band do not want to be depicted as the typical "drink-and-dope rockers." Hence, they want to control uses of their image and music by requiring that the band's approval be given in each instance of marketing and promotion. Examinees might even include language that specifically precludes any alcohol-related marketing efforts.

February 2013 MPT:
In re Wendy Martel

File

Walden, Martin & Watterson LLP

Attorneys at Law
1550 Fleming Boulevard
Clayville, Franklin 33340

M E M O R A N D U M

To: Examinee

From: Kimberly Salter

Re: Wendy Martel matter

Date: February 26, 2013

We have been retained by Wendy Martel, a local attorney, in a matter involving fees arising from her representation of a client, David Panelli, M.D., in a sexual harassment action against his former supervisor, Heather Kern, M.D., at the Sandoval Medical Center.

I interviewed Martel yesterday and learned the basic facts. In 2009, Panelli retained Rebecca Blair, another local attorney, to bring his sexual harassment action against Kern under a contingent fee agreement. In 2011, solely as a result of a personality conflict, Panelli discharged Blair and then retained Martel under a similar contingent fee agreement. Martel recently settled the case and obtained a recovery of $600,000.

Martel contacted Panelli to let him know that she had received the settlement funds and that the money was ready to be disbursed. In response, Panelli instructed Martel not to disburse any of the recovery to Blair for the work she had done before he fired her, and not even to give Blair any information about the settlement. Martel seeks our advice on how to proceed.

Please draft an opinion letter in accordance with our guidelines, identifying the questions raised by these facts and advising Martel how she should proceed.

Walden, Martin & Watterson LLP
Attorneys at Law
1550 Fleming Boulevard
Clayville, Franklin 33340

M E M O R A N D U M

To: Associates
From: Executive Committee
Re: Opinion Letters
Date: December 22, 2009

The firm follows these guidelines in preparing opinion letters to clients. In such a letter to a client, *separately* discuss each question as follows:

- State the question.

- Provide a short answer to the question of no more than a few sentences.

- Analyze the issues raised by the question, including both the facts relevant to the question and how the applicable authorities combined with the relevant facts lead to your answer.

Write in a way that is suitable to the client's level of sophistication and that allows the client to follow your reasoning and the logic of your conclusions.

Transcript of Interview with Wendy Martel

February 25, 2013

Kimberly Salter: Wendy, good to see you. You told me a bit about the case on the phone. Why don't you fill me in on the details?

Wendy Martel: Sure. I've got a problem. My client is David Panelli, a psychiatrist here in Clayville. About three years ago, he sued Heather Kern, another psychiatrist, for sexual harassment. He had just completed his residency at the Sandoval Medical Center; Kern had been his supervisor.

Salter: I remember. It was quite a scandal.

Martel: Yes, it filled the papers. Anyway, Panelli hired a local attorney, Rebecca Blair, under a contingent fee agreement, setting her fee as one-third of anything she recovered during her representation.

Salter: So Blair was his original attorney, and she filed the sexual harassment action?

Martel: Right. She filed the complaint and initiated discovery. Soon after filing the action, she and Panelli started experiencing difficulties in communication. I can't say that either of them was at fault; it was just a personality conflict, but one that escalated over time. By July 2011, Panelli had had enough, and he fired Blair and hired me.

Salter: Did Panelli have problems with the quality of Blair's work?

Martel: No, not at all. It was personality, pure and simple.

Salter: Okay. On what basis did Panelli hire you?

Martel: A one-third contingent fee agreement, just like the one he had with Blair.

Salter: What happened next?

Martel: I reviewed the file after I got it from Blair and found she had done a very good job in litigating the case. I also found a copy of a notice of statutory lien she had filed early on to obtain a security interest in any recovery she obtained for Panelli during her representation. It's standard practice in Franklin in contingent fee cases to file such a lien; here's a copy. I went on to complete discovery and filed a summary judgment motion. The court denied it. Pretty soon, however, Kern's lawyer came to appreciate the strength of our case, and we started to discuss settlement. Last month, we settled the case for $600,000 and filed a dismissal of the action with prejudice.

In the settlement agreement, I obligated myself to pay any claim Blair might have out of the $600,000 and to indemnify Kern and her lawyer in case Blair made any claim against them. That's standard practice in Franklin. Usually, the attorneys can work these matters out.

Salter: Have the settlement funds come through?

Martel: Yes. I just received the check. I have not even cashed it yet.

Salter: Then what?

Martel: I figured I needed to give Panelli what was his and pay Blair something—precisely how much, I didn't know. My practice in situations like this is simply to get on the phone with the other lawyer and work things out informally.

Salter: You didn't do that here?

Martel: No. I sent Panelli an email—here's a copy—telling him I had received the settlement funds. Panelli immediately replied, instructing me not to give Blair anything and not even to tell her anything. I brought his email also. That is when I realized I was in over my head and needed help. So I called you.

Salter: The help you want is an opinion letter, right?

Martel: Right. I need to know how to proceed now that I have the settlement funds. Whatever I do, I want to be sure I am in compliance with Franklin's ethical rules.

Salter: We'll research the issues. What's your time frame?

Martel: Can you get me something soon?

Salter: How about by Thursday?

Martel: That's fine. Thanks, I really appreciate it.

Salter: Thanks. That's all I need. I'll be in touch by Thursday.

STATE OF FRANKLIN
DISTRICT COURT OF SHELBY COUNTY

DAVID PANELLI, M.D.,	)	No. Civ. 640100
Plaintiff,	)	
v.	)	**NOTICE OF LIEN**
HEATHER KERN, M.D.,	)	(Franklin Rev. Stat. § 6070)
Defendant.	)	
	)	

TO ALL PARTIES AND THEIR ATTORNEYS AND TO ALL OTHERS INTERESTED HEREIN:

PLEASE TAKE NOTICE THAT Rebecca Blair, of the Law Offices of Rebecca Blair, attorney of record for Plaintiff David Panelli, M.D., has and claims a lien, under Franklin Revised Statutes § 6070, ahead of all others on Plaintiff's interest in any recovery Blair may obtain herein on Plaintiff's behalf during her representation to secure payment for fees earned.

Date: November 20, 2009

Rebecca Blair

Rebecca Blair
LAW OFFICES OF REBECCA BLAIR
Attorney for Plaintiff David Panelli, M.D.

Email Correspondence

From: Wendy Martel
Sent: Friday, February 22, 2013; 4:24 PM
To: David Panelli
Subject: Settlement Funds

Dear David:

I just received the $600,000 settlement. Before I can proceed further, I've got to notify Rebecca Blair so that she and I can work out some arrangement about sharing the fees. I'll let you know what results.

Best wishes,

Wendy

Wendy Martel
Law Offices of Wendy Martel
100 Drumm Street
Clayville, Franklin 33340
Telephone: 255.555.0859
Email: wmartel@martellaw.com

From: David Panelli
Sent: Friday, February 22, 2013; 4:28 PM
To: Wendy Martel
Subject: RE: Settlement Funds

Wendy:

You must remember, I fired Blair eighteen months ago; I want her to remain fired. I forbid you to tell her anything about the settlement or to give her anything. You got me the recovery; she didn't. You've earned your fee; take it and send me what's mine.

David

February 2013 MPT:
In re Wendy Martel

Library

EXCERPTS FROM FRANKLIN RULES OF PROFESSIONAL CONDUCT

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

. . .

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.4 Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

. . . or

(6) to comply with other law or a court order.

Comment

*   *   *

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. . . . Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the

client but also to all information relating to the representation. A lawyer may not disclose such information except as required or permitted by the Rules of Professional Conduct or other law.

*   *   *

[16] . . . In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish one of the purposes specified in Rule 1.6(b).

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

. . .

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

STATE BAR OF FRANKLIN

ETHICS OPINION NO. 2003-101

Issue:

Client retains Attorney for representation in a personal injury action under a contingent fee agreement entitling Attorney to one-third of any recovery he obtains during his representation. Client obtains medical care from Physician, agreeing that Physician will be paid $10,000 out of the proceeds of any recovery. Attorney and Client both have knowledge of Physician's interest in the recovery. After Attorney obtains a recovery for Client in the amount of $300,000 and places the resulting funds in a trust account, Client instructs Attorney to disburse $100,000 to himself for his fees, to disburse the remaining $200,000 to Client, and not to disburse the $10,000 to Physician. What should Attorney do in this situation?

Digest:

Attorney should contact Client and Physician, describing the existence and details of the dispute and stating (1) that Attorney cannot represent either Client or Physician in the dispute; (2) that if Client and Physician agree, Attorney will retain the disputed $10,000 in trust until they resolve the dispute; but (3) that in the absence of such an agreement, Attorney will seek guidance from the court. Attorney should also disburse to Client that portion of the funds that is undisputed.

Discussion:

In *Greenbaum v. State Bar* (Fr. Sup. Ct. 1996), the Franklin Supreme Court held that an attorney must promptly disburse to the client any funds that the attorney holds in trust for the client that the client is entitled to receive. *Greenbaum* qualified its holding by stating that the attorney may nevertheless continue to hold in trust, even contrary to the client's instructions, any portion of such funds on which the attorney has a claim in conflict with the client. *Greenbaum*, however, did not address the situation in which a third party has such a conflicting claim. The Franklin Rules of Professional Conduct address this issue briefly in the comment to Rule 1.15:

> Third parties may have lawful claims against funds held in trust by an attorney, such as a client's creditor who has a lien on funds recovered in a personal injury action. An attorney may have a duty to protect such a third-party claim against

> wrongful interference by the client, as when the attorney has entered into a fiduciary relationship with the third party. In such cases, the attorney must refuse to surrender the funds to the client until the claim has been resolved, and must so advise the client. An attorney should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Under the facts stated, Attorney must act as follows to remain within the parameters established by our Rules of Professional Conduct:

1. An attorney must disburse to a client such funds as the attorney holds in trust for the client *to which the client is entitled*. Under the facts stated, in representing Client, Attorney had knowledge of the existence of Physician's interest in the funds in question. As a result, Attorney entered into a fiduciary relationship with Physician by operation of law and subjected himself to the fiduciary duties to deal with Physician with utmost good faith and fairness and to disclose to Physician material facts relating to Physician's interest in the funds. *Cf. Johnson v. State Bar* (Fr. Sup. Ct. 2000) (by representing client with knowledge of chiropractor's lien, attorney entered into fiduciary relationship and subjected herself to fiduciary duties to deal with chiropractor with utmost good faith and fairness and to disclose material facts, that is, those facts that are "significant or essential to the issue or matter at hand"). Under such circumstances, Attorney's disbursement of the disputed $10,000 to Client would violate Attorney's fiduciary duties to Physician and would make Attorney liable for compensatory and perhaps even punitive damages. Attorney's disbursement would also make Client liable for breach of contract. Franklin Rule of Professional Conduct 1.4(a)(5) requires a lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by [these rules] or other law." For this reason, Attorney's disbursement of the disputed funds to Client would be fraught with difficulties.

2. Attorney's disbursement of the disputed $10,000 to Physician contrary to Client's instructions would violate Attorney's duties under *Greenbaum*. *Greenbaum* requires Attorney to disburse to

Client all such funds as Client is entitled to receive. It is risky for Attorney unilaterally to determine Client's "entitlement." The reasons for Client's demand that Attorney not disburse the $10,000 to Physician are unstated and may or may not be legitimate. For example, Client may have an evil motive, or Client may be misinformed about something and that misinformation has led to his instruction to Attorney. Whatever his reasons, they are not clear from the facts before us and may not be clear to Attorney. There are, in addition, fiduciary duties burdening Attorney in favor of Physician. For those reasons, Attorney would be ill-advised to prejudge the merits of such a dispute and act in favor of either Client or Physician.

3. If Client and Physician are unable to resolve their dispute, Attorney should seek guidance from the court and so inform Client and Physician.

This opinion is issued by the State Bar of Franklin pursuant to authority delegated to it by the Franklin Supreme Court. It is intended to guide attorneys who practice in the State of Franklin but does not purport to bind any court or other tribunal.

Clements v. Summerfield

Franklin Supreme Court (1992)

Plaintiff Ralph Clements, an attorney, was retained by defendant Marian Summerfield to bring an action for personal injury. Clements and Summerfield entered into a contingent fee agreement, under which Summerfield agreed to pay Clements one-third of any recovery he obtained during his representation. Some time thereafter, but before any recovery had been obtained, Summerfield discharged Clements and retained another attorney.

Clements then filed the present action against Summerfield, alleging that Summerfield breached the contingent fee agreement by discharging him without cause and by refusing to pay him his fees. Clements sought a declaration that the agreement was valid and that he had a one-third interest in any recovery ultimately obtained. Summerfield moved to dismiss the action on the ground that Clements did not and could not state a claim for relief. The district court granted the motion and dismissed the action. The Court of Appeal affirmed. We granted review.

Under a contingent fee agreement, an attorney does not have any right to fees unless and until the contingency specified has occurred. Without a right to fees, the attorney does not have a cause of action against the client for breach arising from failure to pay. The contingency specified may occur after the attorney's representation has terminated and another attorney has taken his or her place. In that case, the discharged attorney's right to, and cause of action for, fees is limited to *quantum meruit*, that is, the reasonable value of the services rendered during his or her representation, paid as a share of the total fees payable to the successor attorney—not as something in addition to those fees. Otherwise, the client's right to discharge the discharged attorney, which is absolute, might be unduly burdened by the prospect of paying the original attorney's full fees plus fees to the successor attorney as well.

We find no injustice in limiting the fees of the discharged attorney to an amount consisting of the reasonable value of the services rendered during the representation. In doing so, we preserve, as noted, the client's absolute right to discharge the discharged attorney. We also preserve the discharged attorney's right to fees that are fair. Of course, what fees are fair for the discharged attorney depends on the facts of the individual case as seen through the lens of equity, and may range from nothing out of the total fees payable to the successor attorney to the total fees in their entirety. We expect that in all but the rarest case, a fair fee for the discharged attorney will fall somewhere between those extremes. We trust that trial courts will be able to strike an appropriate balance.[1]

In light of the foregoing, Clements' action is premature. Since Summerfield has yet to obtain any recovery in her personal injury action, the contingency specified in the contingent fee agreement has yet to occur. As a result, Clements does not yet have any right to fees from Summerfield, and hence does not yet have a cause of action against her for fees.

Affirmed.

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[1]By way of illustration, if a discharged attorney obtained no recovery during his representation, he would be entitled to nothing under his contingent fee agreement. If a successor attorney subsequently obtained a recovery during her representation, she would be entitled to receive whatever her contingent fee agreement specified—for example, if she had a one-third contingent fee agreement and obtained a $300,000 recovery, she would be entitled to receive $100,000. The discharged attorney would then be entitled to receive whatever share, if any, of the $100,000 fee received by the successor attorney that the court determined to be the reasonable value of his services under the circumstances.

February 2013 MPT:
In re Wendy Martel

Point Sheet

This February 2013 MPT Point Sheet was provided to bar examiners to assist in grading the examination. It addresses the factual and legal points encompassed within the MPT. While it is illustrative of the discussions that might have appeared in excellent responses constructed by examinees, it is more detailed than examinee responses were expected to be.

DRAFTERS' POINT SHEET

Examinees' law firm has been asked by attorney Wendy Martel for advice about a problem arising out of her representation of David Panelli, M.D. Martel has recently settled Panelli's case, has just received the settlement funds, and has yet to cash the check representing the settlement amount. Martel's questions involve issues of what she may do in the face of Panelli's instructions prohibiting her from disbursing any of the recovery to Rebecca Blair, Panelli's former attorney, and prohibiting her from even giving Blair any information about the recovery. Examinees' assignment is to draft an opinion letter for Martel, in accordance with the firm's memorandum on drafting client opinion letters, which instructs examinees to (1) state each question involved; (2) provide a short answer to the question; and (3) write an analysis of the issues raised by the question, including the relevant facts and how the applicable authorities combined with the relevant facts lead to the conclusion.

The File consists of the instructional memo from the supervising attorney, the memorandum on opinion letters, a transcript of the interview with Martel, a copy of Blair's lien, and copies of the Martel/Panelli emails. The Library consists of excerpts from the Franklin Rules of Professional Conduct, an ethics opinion, and a case from the Franklin Supreme Court.

The following discussion covers all the points the drafters of the item intended to incorporate, but examinees may receive good grades without covering them all.

I. Background

In 2009, Dr. David Panelli, a psychiatrist, brought an action for sexual harassment against Heather Kern, M.D., who had been his supervisor at the Sandoval Medical Center while he was a resident. Panelli retained attorney Rebecca Blair pursuant to a contingent fee agreement, entitling her to a fee of one-third of any recovery that she might obtain against Kern during her representation. Blair filed a notice of statutory lien against any recovery to secure her fee, which is standard practice in Franklin.

Between 2009 and 2010, Blair filed the complaint and initiated discovery. Soon after filing the lawsuit, she and Panelli experienced difficulties in communication as a result of a personality conflict. The personality conflict escalated over time.

In 2011, as a result of their personality conflict, Panelli discharged Blair and retained Martel in her place under a contingent fee agreement, like the one with Blair, entitling Martel to a fee of one-third of any recovery that she might obtain against Kern. Martel undertook her representation of Panelli with knowledge of Blair's lien. Upon review of the case file Martel received from Blair, Martel determined that Blair had done a very good job in litigating the case.

One month ago, Martel settled Panelli's sexual harassment action against Kern for $600,000. In the settlement agreement, Martel obligated herself to pay, out of settlement funds, any claim Blair might have and to indemnify Kern and her attorney in case Blair made any claim against them. Such an obligation is consistent with local practice. The court dismissed the action with prejudice.

On February 22, 2013, Martel received the $600,000 settlement and informed her client, Panelli, that she had received the funds and would contact Blair concerning Blair's share. Panelli instructed Martel not to disburse any of the recovery to Blair and not even to give Blair any information about the recovery. Panelli instructed Martel to disburse her fee to herself and to disburse what remained to him.

Martel has come to examinees' law firm for advice. She believes that Blair is entitled to some part of the recovery, but because of Panelli's instructions, she is unsure how to proceed and wants to be sure that whatever she does, she acts ethically.

II. The Substantive Law

Under *Clements v. Summerfield* (Fr. Sup. Ct. 1992), an attorney has a right to his or her fee from a client under a contingent fee agreement when the contingency specified has occurred and does not have any such right unless and until the contingency occurs. If the contingency occurs after the representation has terminated, the attorney's right to his or her fee is limited to the reasonable value of the services rendered during the representation (i.e., *quantum meruit*), paid out of the total fee payable to any successor attorney.

According to *Greenbaum v. State Bar* (Fr. Sup. Ct. 1996), cited in Franklin State Bar Ethics Op. No. 2003-101, an attorney must promptly disburse to the client any funds that the attorney holds in trust for the client that the client is entitled to receive. An attorney may nevertheless continue to hold in trust, even contrary to a client's instructions, any portion of funds that the attorney holds in trust for the client on which a third party has a claim in conflict with the client, and must so advise the client. The attorney should not resolve the dispute unilaterally. Franklin State Bar Ethics Op. No. 2003-101.

Under *Johnson v. State Bar* (Fr. Sup. Ct. 2000), cited in Franklin State Bar Ethics Op. No. 2003-101, an attorney becomes a fiduciary to a third party, and subjects him- or herself to fiduciary duties running in the third party's favor, by undertaking representation of a client with knowledge of the third party's lien against the client's recovery. The fiduciary duties in question include the duty to deal with the third party with utmost good faith and fairness and to disclose material facts.

III. Ethical Requirements

Several ethics rules are directly relevant to this item.

Franklin Rule of Professional Conduct 1.15 sets forth several attorney obligations in the possession of property of another, including maintenance in a separate account. Rule 1.15(d) imposes a duty on the attorney to notify the client or third person of the possession of property in which the client or third person has an interest and imposes a duty to deliver such property to the client or third person. Rule 1.15(e) imposes a duty to keep property separate when multiple parties with an interest in the property dispute the nature of one another's interests, until the dispute is resolved.

In addition, under Franklin Rule of Professional Conduct 1.4(a)(3), an attorney must keep the client reasonably informed about the matter, and 1.4(a)(5) requires an attorney to consult with his or her client about any relevant limitation on the attorney's conduct when the attorney knows that the client expects assistance not permitted by the Rules or other law.

Franklin Rule of Professional Conduct 1.6 states that an attorney may not reveal information relating to the representation of a client unless

- the client gives informed consent, Rule 1.6(a);
- the disclosure is impliedly authorized in order to carry out the representation, *id*.; or
- the disclosure is permitted as specified by Rule 1.6(b), including
    - to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another, Rule 1.6(b)(2); and
    - as otherwise required or permitted by law, Rule 1.6(b)(6) & Comment [3].

Even when permitted to make a disclosure, an attorney should not make a disclosure that is greater than the attorney reasonably believes necessary to accomplish the purpose. Rule 1.6, Comment [16].

IV. Analysis

Examinees must read the client interview, other factual materials, and the Franklin Rules of Professional Conduct and other legal authorities to determine the issues presented by Martel's situation and then draft a well-reasoned opinion letter that offers clear advice to Martel on how she should proceed. Because a component of the task is identifying and articulating the issues Martel faces, it is expected that examinees may take slightly different approaches to describing the questions raised. Nevertheless, examinees should recognize that the opinion letter to Martel should address Martel's duty to safeguard the settlement funds, whether (and when) any of the settlement funds should be disbursed to Panelli, whether Blair has a claim to a share of the funds and how her share should be measured, what information about the case Martel may provide to Blair, and what additional advice, if any, Martel should give to Panelli. Examinees may set out these issues as five distinct questions (as in the example below) or may analyze them in some other combination.

The discussion below illustrates how examinees might set forth the questions raised in Martel's situation.

1. Martel's responsibility for the settlement funds

Question presented: What is Martel's responsibility upon receiving property in which others have an interest?

Short answer: Upon receipt of property in which others have an interest, Martel must keep the property separate from her own property, typically in a trust account.

Analysis: The initial responsibility for an attorney is to safeguard the property and to separate her own property from that in which a client or third party has an interest. Rule 1.15(a). Thus Martel should immediately deposit the $600,000 settlement check into her client trust account. Further, Martel must notify the client, a step she has already taken. Rule 1.15(d).

2. Disbursement of funds

Question presented: What, if any, disbursement is Martel required to make to the client, Panelli, and when is she required to make it?

Short answer: Martel is required to disburse to Panelli $400,000 of the $600,000 recovery and is required to do so now.

Analysis: Martel is required to disburse to the client, Panelli, $400,000 out of the $600,000 recovery she holds in trust because it is clear that this is the amount to which the client is entitled and there is no one else claiming an interest in this portion of the settlement. Rule 1.15(d); *see also Greenbaum v. State Bar*. The recovery is in settlement of Panelli's sexual harassment action against Kern. Panelli is entitled to immediately receive the recovery of $600,000 *minus* the $200,000 that Martel is entitled to receive under her one-third contingent fee agreement, *see Clements v. Summerfield*, resulting in an undisputed amount of $400,000 due to Panelli.

3. Blair's claim

Question presented: Does Blair have a claim for fees and, if so, what if anything is Martel required to do in response?

Short answer: Blair has a claim for fees based on the reasonable value of the services she rendered during her representation. Until the matter is resolved, Martel is required to hold the $200,000 in trust.

Analysis: Blair has a claim for fees for her work for Panelli based on her contract with Panelli and the doctrine of *quantum meruit*. *Clements v. Summerfield*. Blair had a contract with Panelli that was contingent upon a recovery. That contingency has been met because there is a settlement. Therefore, Blair's claim is ripe. She filed a lien to protect that claim, and Martel is aware of that lien. In addition, in the settlement agreement, Martel obligated herself to pay any claim that Blair might have and to indemnify Kern and her attorney from any claim that Blair might make against them.

The amount owed to Blair must be determined by a court because Panelli has forbidden any discussion between Martel and Blair about the case. Normally, the amount owed to the discharged attorney is determined under equitable principles, based on the doctrine of *quantum meruit*. *Clements v. Summerfield*. Determining the value of the services performed by Blair will most likely require disclosure of information beyond that which Martel can make. *See* Franklin State Bar Ethics Op. No. 2003-101. Perceptive examinees might note that once she has knowledge of the fact and amount of the recovery, Blair can file an action, and the court can then determine the amount owed to her. This amount is not one Blair and Martel can work out on their own because it would require Martel to reveal more information than she is permitted to reveal.

Until the Blair claim is resolved, Martel must hold the entire $200,000 in the trust account and cannot disburse any portion to herself.

4. Confidentiality and Blair

Question presented: What, if anything, is Martel required or permitted to disclose to Blair?

Short answer: Martel is *required* to disclose to Blair the fact and the amount of the recovery. Martel is neither required nor permitted to disclose to Blair anything else.

Analysis: Because Blair has a claim, Martel is required to disclose to Blair the fact and the amount of the recovery. Rule 1.15(d). Martel owes a fiduciary duty to Blair to disclose facts material to the recovery because she undertook representation of Panelli with knowledge of Blair's lien against Panelli's recovery. *See* Franklin State Bar Ethics Op. No. 2003-101; *Johnson v. State Bar*, cited therein. The fact and the amount of the recovery are material to Blair's claim for her fee based on the reasonable value of the services she rendered during her representation of Panelli. *Clements v. Summerfield*. Without information about the fact and the amount of the recovery, Blair cannot make any claim, and Martel is not permitted to resolve the situation unilaterally. *See* Franklin State Bar Ethics Op. No. 2003-101.

It is true that the duty of confidentiality imposed on Martel by Franklin Rule of Professional Conduct 1.6 extends to all information relating to the representation of a client—which, in this case, includes information relating to the recovery. *See* Rule 1.6, Comment [3]. But the duty of confidentiality does *not* prohibit Martel from making the disclosure in question because it permits disclosure as otherwise required by law, namely, the law governing the fiduciary relationship of Martel to Blair. Rule 1.6(b)(6). Until the matter with Blair is resolved, Martel is required to continue to hold the $200,000 in trust. *See* Franklin State Bar Ethics Op. No. 2003-101; Rule 1.15(e).

Some examinees may argue that Martel may reveal information related to representation of Panelli in order to prevent him from committing fraud. *See* Rule 1.6(b)(2). The fraud exception to the confidentiality of information depends on a determination of the client's intent, because fraud requires an intent to deceive. It is unclear from the facts whether Panelli has an intent to deceive. The Franklin Ethics Opinion points out that under the facts presented there, the client's motive was unclear. Likewise, here it is unclear why Panelli has given the instruction he has. Examinees who rely on the fraud exception to disclose information must point to some facts that show intent to deceive, i.e., that Panelli understands that under the contract between Blair and Panelli, Blair is entitled to a portion of the funds, and that nevertheless Panelli wants to prevent Blair from recovering by concealing information through the attorney-client privilege. Other examinees might argue that the fraud exception might apply but that the facts do not provide enough information to prove that Panelli intends to deceive. Either conclusion has merit, but examinees must address the issue of intent to deceive as an element to be proven. If indeed there is intent to deceive, the fraud exception would be applicable, but if not, it would not be applicable.

In sum, Martel is not permitted to disclose to Blair anything more than the fact and the amount of the recovery, since the duty of confidentiality prohibits her from disclosing more information than she reasonably believes necessary to accomplish the purpose. *See* Rule 1.6, Comment [16].

5. Martel's duty to Panelli

Question presented: What advice is Martel required to give to Panelli?

Short answer: Martel is required to advise Panelli that

- Martel owes a fiduciary duty to Blair to disclose facts material to the recovery, and Martel cannot do what Panelli has instructed because to do so would violate her legal duty to Blair and expose Martel to liability for a breach of her fiduciary duty to Blair;
- Panelli's instructions may expose him to liability to Blair for breach of contract with respect to their initial contingent fee agreement; and
- Martel cannot and will not follow his instructions.

Analysis: An attorney cannot honor a client's instructions when following those instructions would violate another duty. Martel owes a fiduciary duty to Blair to disclose facts material to the recovery. Franklin State Bar Ethics Op. No. 2003-101; *Johnson v. State Bar*, cited therein; *see* Rule 1.4(a)(5).

Panelli's instructions expose Panelli himself to liability for breach of contract with respect to his contingent fee agreement with Blair, *see Clements v. Summerfield*, and expose Martel to liability for breach of fiduciary duty, *see Johnson v. State Bar*, cited in Franklin State Bar Ethics Op. No. 2003-101. *See* Rule 1.4(a)(5).

In short, Martel cannot ethically follow Panelli's instructions. *See* Rule 1.4(a)(5). And Martel must inform Panelli that she will not follow these instructions. *See* Rule 1.4(a)(3).